# 82-1493

No.

## In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN F. HEALY, *et al.*

*Appellants,*

*v.*

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*

*Appellees,*

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## JURISDICTIONAL STATEMENT

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Dated: March 4, 1983

## QUESTION PRESENTED

Whether Connecticut's Beer Price Affirmation Provisions have an impermissible extraterritorial effect in violation of the Commerce Clause of the United States Constitution?

## PARTIES

The parties in the action are as follows:

### APPELLANTS

JOHN F. HEALY, DAVID L. SNYDER, and LOUIS A. SIDOLI, as Commissioners of the Department of Liquor Control; and CHARLES W. KASMER, as Secretary of the Department of Liquor Control.

### APPELLEES

UNITED STATES BREWERS ASSOCIATION, INC., as an association, and on behalf of its members selling beer in the State of Connecticut and the bordering States of Massachusetts, New York, and Rhode Island:

ANHEUSER-BUSCH, INC.
CHRISTIAN SCHMIDT BREWING COMPANY
G. HEILEMAN BREWING COMPANY, INC.
LATROBE BREWING COMPANY
PABST BREWING COMPANY
THE F. & M. SCHAEFER BREWING COMPANY
JOS. SCHLITZ BREWING COMPANY

ANHEUSER-BUSCH, INC.; CHAMPALE, INC.;
MILLER BREWING COMPANY; CENTURY IMPORTERS;
DRIBECK IMPORTERS, INC.; GUINNESS-HARP CORPORATION;
KRONENBOURG USA, INC.; MARTLET IMPORTING COMPANY;
and VAN MUNCHING AND COMPANY, INC.

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## JURISDICTIONAL STATEMENT

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in 692 F.2d 275 and a copy is attached hereto in the Appendix at page 44a. The earlier opinion of the United States District Court for the District of Connecticut is reported in 532 F.Supp. 1312 and a copy is attached hereto in the Appendix at page 3a. The District Court's order, issued upon remand, is attached hereto in the Appendix at page 64a.

## JURISDICTION

This case is an action for declaratory judgment purportedly pursuant to 28 U.S.C. Secs. 1331 and 1337(a). The declaratory judgment and injunctive relief was sought under 28 U.S.C. Secs. 2201 and 2202. Appellees challenged the validity of the Beer Price Affirmation Provisions of the Connecticut

Liquor Control Act, C.G.S. Secs. 30-63a(b), 30-63b(b) and 30-63c(b), as being violative of the Constitution of the United States, most particularly, the Commerce Clause, Art. I, Sec. 8, cl. 3; and, the Supremacy Clause, Art. VI, cl. 2, through a statute of the United States regulating commerce, Section 1 of the Sherman Act, 15 U.S.C. Sec. 1.

The U.S. District Court for the District of Connecticut upheld the Beer Price Affirmation Provisions, granting, on February 16, 1982, the Motion for Summary Judgment filed on behalf of John F. Healy, *et al.* That decision was appealed and the U.S. Court of Appeals for the Second Circuit reversed and remanded the matter on November 1, 1982 finding that the Beer Price Affirmation Provisions violated the Commerce Clause of the U.S. Constitution. A Notice of Appeal was filed in the U.S. Court of Appeals in New York, New York, on November 22, 1982. A copy of the Notice is attached hereto in the Appendix at page 65a. The original time limit within which to docket this appeal was extended to March 10, 1983. A copy of that order is attached hereto in the Appendix at page 68a.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. Sec. 1254(2).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

*The Commerce Clause of the U.S. Constitution*

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
>
> U.S. Const., Art. I, Sec. 8, cl. 3

*The Twenty-first Amendment to the U.S. Constitution*

"The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

U.S. Const., Amend. XXI, Sec. 2

*The Beer Price Affirmation Provisions of the Connecticut Liquor Control Act*[1]
(Public Act 81-294)

"No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler.

C.G.S. Sec. 30-63a (b) as amended by P.A. 82-330

At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirma-

[1]Subsequent to the initiation of this litigation, the Beer Price Affirmation Provisions were amended by Public Act 82-330 to clarify that they apply to keg beer as well as packaged containers. This amendment has no impact on the issue before the Court.

tion under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees during the period of the posting will be no higher than the lowest price at which each such item of beer is or will be sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state, at any time during the calendar month covered by such posting.

C.G.S. Sec. 30-63b (b) as amended by P.A. 82-330

In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits or each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Con-

necticut wholesalers all of the sizes, approved by the Depa:tment of Liquor Control, of his brand which he offers to any wholesaler in any state bordering this state.

C.G.S. Sec. 30-63c (b)

*The Posting Provisions of the Connecticut Liquor Control Act*[2]

(a) No holder of any manufacturer, wholesaler or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale, any alcoholic liquors unless the name of the brand, trade name or other distinctive characteristic by which such alcoholic liquors are bought and sold, the name and address of the manufacturer thereof and the name and address of each wholesaler permittee who is authorized by the manufacturer or his authorized representative to sell such alcoholic liquors are registered with the department of liquor control and until such brand, trade name or other distinctive characteristic has been approved by the department. Such registration shall be valid for a period of three years. The fee for such registration, or renewal thereof, shall be one hundred dollars for out-of-state shippers and three dollars for Connecticut manufacturers for each brand so registered, payable by the manufacturer or his authorized representative when such liquors are manufactured in the United States and by the importer when such liquors are imported into the United States.

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[2]Subsequent to the initiation of this litigation, the Posting Provisions were amended by Public Act 82-330 to clarify that they apply to keg beer as well as packaged containers, and by Public Act 82-238 raising the registration fee from $25 to $100. These amendments have no impact on the issue before the Court.

(b) No manufacturer, wholesaler or out-of-state shipper permittee shall discriminate in any manner in price discounts between one permittee and another on sales or purchases of alcoholic liquors bearing the same brand or trade name and of like age, size and quality, nor shall he allow in any form any discount, rebate, free goods, allowance or other inducement for the purpose of making sales or purchases.

(c) Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state shipper permittee for the month following such posting. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery. Price postings with the department setting forth wholesale prices to retailers shall be available for inspection during regular business hours at the offices of the department by manufacturers and wholesalers until three o'clock p.m. of the first business day after the last day for posting prices. A manufacturer or wholesaler may amend his posted price for any month to meet a lower price posted by another manufacturer or wholesaler with respect to alcoholic liquor bearing the same brand or trade name and of like age, vintage, quality and unit container size; provided that any such amended price posting shall be filed before three o'clock p.m. of the fourth business day after the last day for posting prices; and provided further

such amended posting shall not set forth prices lower than those being met. Any manufacturer or wholesaler posting an amended price shall, at the time of posting, identify in writing the specific posting being met.

C.G.S. Sec. 30-63 as amended by P.A. 82-330 and P.A. 82-238

## STATEMENT OF THE CASE

This case is a direct appeal from a judgment of the U.S. Court of Appeals for the Second Circuit dated November 1, 1982, which reversed a decision of the U.S. District Court for the District of Connecticut dated February 16, 1982, and ordered judgment in favor of Appellees.

Appellees (hereinafter collectively sometimes as brewers) are the major manufacturers/importers of beer in the United States. They initiated this lawsuit in response to the enactment, by the Connecticut General Assembly in 1981, of what will be referred to herein as the Beer Price Affirmation Provisions or P.A. 81-294.

Connecticut has a three-tier method of distribution for liquor sold within its borders, i.e. out-of-state shipper, wholesaler, retailer, and each must hold a valid Connecticut license to sell alcoholic beverages to the tier below, or, in the case of the retailer, to the consumer. Prior to this enactment the brewers, who had to possess valid Connecticut out-of-state shippers' licenses to sell beer in Connecticut to licensed wholesalers, were compelled by virtue of Section 30-63(c) (hereinafter Posting Law) *only* to post their respective per unit prices with the Liquor Control Commission, which price when so posted (on the 13th of the preceding month by Liquor Control Commission regulation) was the controlling price for the particular product for the next succeeding

month. The brewer could neither raise nor lower this price, absent obvious mathematical error, during this one month period. Obviously then, the brewers operated under a statutory system which enabled them to unilaterally establish prices in Connecticut without regard for the price the same brewer had established for the same product in another state. Conversely, the brewer could likewise establish a price in another state safe in the knowledge that such pricing decision would have no effect or impact upon its Connecticut pricing decision. In this respect the Connecticut system of beer regulation differed drastically from the system of liquor regulation, for since 1973 the manufacturers of liquor (distilled spirits) had successfully operated under the identical type of structure which P.A. 81-294 imposed upon the beer industry, and which system is under vigorous attack in this lawsuit.

This public act effected three major changes in the Connecticut law and these statutory changes are the sole focus of Plaintiffs' Complaint in this matter. These specific enactments are: (a) Section 30-63a(b), Connecticut General Statutes (hereinafter sometimes Sales Law) which renders it unlawful for a brewer to sell its particular product in Connecticut at a price which is *then* higher than the lowest price at which it sells the same product in any one of the three contiguous states (i.e. New York, Massachusetts, Rhode Island); (b) Section 30-63b(b), Connecticut General Statues (hereinafter sometimes Affirmation Law) which mandates that the brewer, at the time of the "posting" of his prices with the Liquor Control Commission (as previously discussed), must also file an "affirmation", which is, in effect, a sworn statement that the "posted price" is a price which is, and will be, no higher than the lowest price at which it will sell its product in any one of the three surrounding states during the next succeeding month. (This Court will please

note, the only difference between the beer price affirmation system and the long standing liquor affirmation system is that, with liquor affirmation, those manufacturers must swear that the posted price, at which they will sell their product during the next month, is no higher than their respective individual prices in any of the other forty-nine states, while the brewers need only concern themselves with the three surrounding states); (c) Section 30-63c(b), Connecticut General Statutes (hereinafter Lowest Determinator Law) which compels the brewer to determine his "lowest price" for posting purposes in Connecticut after making those adjustments for rebates, discounts, allowances or other inducements which may have been permitted by law in the other three sister states. The brewer is also required to offer for sale in Connecticut all of the same sizes of its brand that are offered in said states.

In its Complaint in the District Court the brewers alleged the constitutional infirmity of this new Connecticut system based primarily on two foundations: 1.) that the act compelled the brewers to engage in price-fixing activity otherwise forbidden by Section 1 of the Sherman Act thus constituting a violation of the Supremacy Clause; and 2.) that the act contravened the command of the Commerce Clause because the activity it compelled was either protectionist in purpose or effect, or imposed an impermissible burden on interstate commerce. *United States Brewers Ass'n Inc. v. Healy*, 692 F.2d 275, 278, App. p. 50a. The District Court denied temporary injunctive relief and after reception of briefs and all proffered materials from both sides, granted Appellants' Motion for Summary Judgment and denied the brewers' similar motion.

On appeal, the Court of Appeals explicitly declined to review or consider the Supremacy Clause questions allegedly presented by this case. 692 F.2d 275, 278, App. p. 51a. The

Court of Appeals did recognize the "all-out" nature of the brewers' Commerce Clause attack against the new Connecticut system and, we submit, impliedly at least, concurred with the District Court's analysis concerning each of the presented, briefed and argued Commerce Clause issues. See 692 F.2d 275, 281 n.11-14, App. p. 57a-59a. Nonetheless, the Court of Appeals reversed the lower court's judgment on the basis of what we believe to be a theretofore unraised, and hence unaddressed, Commerce Clause issue—to wit, the existence of an alleged extraterritorial thrust in the Connecticut law. On the basis of its conclusion, the Court of Appeals ordered that judgment be entered by the District Court declaring the Connecticut Beer Price Affirmation Provisions to be unconstitutional.

## THE QUESTIONS ARE SUBSTANTIAL

The Court of Appeals has quite cogently and completely summarized the gravamen of the brewers' attack on the Connecticut law. 692 F.2d 275, 281, App. p. 50a. As noted previously, we believe that the court evidences its agreement with the lower court analysis which resulted in a judgment favorable to the Appellants herein. However, it appears clear that the Court of Appeals centered its focus and concern upon an issue which was not raised by the brewers nor responded to by the State, namely, the perceived "extraterritorial thrust" of the Connecticut system. Indeed the court acknowledges that the District Court did not consider (because, we submit, uninvited by the brewers) any alleged extraterritorial thrust in its Commerce Clause analysis and only tangentially treated the issue in that portion of its decision dealing with the Supremacy Clause. 692 F.2d 275, 282, n.15, App. p. 60a. Essentially then the Court has raised an issue *suo motu* determined that issue, and reversed the lower court judgment on the basis of that determination, without first having given that court, or the parties, the opportunity to address it.

While the brewers' Complaint specifically isolated and attacked those three statutory sections previously identified in this brief as the Sales Law, the Affirmation Law and the Lowest Determinator Law, the Court of Appeals centered its attention on the perceived impact which the previously existing Posting Law had upon these enactments. 692 F.2d 275, 276, n.3, App. p. 47a. The Posting Law requires that the brewer "post" its controlling sales price for its product, in Connecticut, in all its various sizes, effective for the next 30 days. The new Affirmation Law requires that the brewer at the time of the "posting" (which must occur some 17-18 days prior to its effectiveness) affirm or swear that this "posted price", during the future month, will be no higher than the powest price charged by the brewer for the same product and size sold during that same period in any one of the three surrounding states. The new Sales Law renders it unlawful for the brewer to sell its product in Connecticut at a price which is *then* higher than the lowest prevailing price in a surrounding state. The Court of Appeals is quite candid in postulating that the Posting Law, in and of itself, has no extraterritorial thrust. 692 F.2d 275, 282, App. p. 60a. But what it identifies as "the main beer price affirmation provisions" (the Sales Law and the Affirmation Law) 292 F.2d 275, 282, App. p. 60a, when considered in conjunction with the Posting Law, take on this extraterritorial thrust. In its own words the Court says:

> ". . . [T]hese sections tell a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, it may not do so at a price lower than that it has previously announced it will charge to Connecticut wholesalers."
>
> 292 F.2d 275, 282, App. p. 60a.

First we ask this Court to recognize that the Sales Law does not, by itself or jointly with these other provisions, foster

or promote this future-looking, border-escaping thrust on prices. It will not escape this Court's attention, drawn from even a cursory reading of the Sales Law, that this particular statutory section stands alone in the sense that it makes no reference whatsoever to a "posted price" or "affirmation" but has applicability *only* to simultaneous sales in a surrounding state. Even the Court of Appeals, apparently in reliance upon this Court's holding in *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 86 S.Ct. 254, 16 L.Ed.2d 336 (1966), recognized that ". . . a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states, . . . , leaving those out-of-state prices unregulated by Connecticut" would, most probably, survive any Commerce Clause attack. 292 F.2d 275, 283-284, App. p. 63a. We submit that this Connecticut Sales Law, in and of itself, does no more than that which the lower court said was permissible. That is, this severable law instructs the brewer *only* that it may not sell its product in Connecticut for a price which is, at the precise moment of sale, higher than the lowest price at which the product is then being sold in one of the other states.

While we vigorously dispute that any of the Connecticut laws have a constitutionally impermissible extraterritorial thrust, singly, or collectively, we ask this Court, as we did the Court of Appeals in a Motion for Stay dated November 18, 1982, to recognize that the Sales Law is independent of, and severable from, that border-crossing evil perceived by the Court of Appeals and order the judgment modified accordingly. We hasten to add, most emphatically, that the foregoing is not intended to, and does not, constitute our primary position but, rather, only an alternative or secondary position in this matter.

We respectfully submit that the Court of Appeals was in error in declaring the Connecticut system unconstitutional.

The Court of Appeals found that the Posting Law in conjunction with the Affirmation Law resulted in a system which effectively "control[led] the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut." 292 F.2d 275, 282, App. p. 60a. The Court viewed this as action which "set the minimum prices for the sale of beer in . . . [another] state . . ."; conduct which it felt was clearly impermissible. 292 F.2d 275, 282, App. p. 60a.

However, as its basis for so viewing the Connecticut statutory scheme, the Court relied upon, and specifically quoted, the following language from the District Court decision:

> "Because it is geared to the future, the Connecticut statute effectively sets minimum prices for the four-state area once the price is posted in Connecticut on the thirteenth of the month."
>
> 292 F.2d 275, 282, App. p. 60a, quoting *from United States Brewers Ass'n v. Healy*, 532 F.Supp. 1312, 1329.

As the Court of Appeals correctly points out this language comes from the portion of the District Court's analysis dealing with the Supremacy Clause issues 292 F.2d 275, 282 n.15, App. p. 60a. We submit that when the District Court posited this proposition it was merely re-stating the brewers argument as to the effect of the Connecticut law and not "succinctly describing" or finding that this was indeed the effect of the Connecticut statutes. In other words, we believe the District Court was merely saying that, even assuming this to be the effect, such had no adverse impact so as to constitute price-fixing in violation of the Sherman Act. We respectfully dispute that the District Court found the Connecticut law to have as its effect or purpose, the fixing of minimum prices in other states.

The Court of Appeals found it unnecessary to reach any of the Commerce Clause issues raised by the Appellees saying, ". . . it is *evident* that the Connecticut statute *seeks* to regulate prices not just in Connecticut but in its surrounding states as well." (Emphasis added), 292 F.2d 275, 282, App. p. 59a. To say the statute "seeks to regulate" is to say that the *intention* or purpose of the statute is to regulate prices in other states. The use of such a phrase may have been inadvertent on the part of the court for this statement is quickly followed in the text with the categorization that "the obvious *effect* of the Connecticut statute is to control the minimum price" of the brewers' product in another state. (Emphasis added), 292, F.2d 275, 282, App. p. 60a. If not inadvertent, then the statement flies in the face of the specific holding of the District Court:

> The purpose of the beer price affirmation statute is to lower the price of beer to Connecticut consumers thereby increasing the purchase of beer by Connecticut residents within the state, and generating increased tax revenues. 532 F.Supp 1312, 1316-17, App. p. 9a.

Clearly then, it is inaccurate to say that the aim of the Connecticut law was to control or set prices in other states.

However, the decision of the Court of Appeals can also be reasonably read to indicate that, regardless of the state's intent, since the effect of the operation of the statute is seen as controlling the price of beer in another state, then it is violative of the command of the Commerce Clause. *Dean Milk Co. v. Madison*, 340 U.S. 349, 354, 71 S.Ct. 295, 95 L.Ed. 329 (1951). Notably, the Court of Appeals, in reaching its conclusion that the Connecticut provisions effectively controlled minimum beer prices in the contiguous states, relied heavily upon this Court's "repeated references to *Baldwin v. G. A. F. Seelig, Inc.*" throughout the course of its opinion

regarding New York's affirmation laws in *Seagram*, 692 F.2d 275, 283, App. p. 62a. The Court of Appeals found it to be extremely significant that this Court, during the course of its *Seagram* decision, made reference to a particular page (although not the particular quote) in the *Seelig* opinion whereupon was to be found the following language: ". . . [i]t is a very different thing to establish a . . . scale of prices for use in other states. . . ." 292 F.2d 275, 283, App. p. 62a, quoting from *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 528, 55 S.Ct. 497, 79 L.Ed. 1032 (1935). Thus, it would appear, the Court of Appeals viewed the Connecticut laws as somehow establishing the minimum price of beer and then exporting and forcing that price to and upon sister states.

This indeed was the very evil condemned by this Court in *Seelig*. In *Seelig*, the state of New York, by statute, extracted a promise from those milk distributors doing business in New York to pay a price for foreign milk (i.e. out-of-state produced milk) which was *no lower* than the price which had been established by New York producers for similar domestically produced milk. Undeniably then, New York was in fact exporting a price to a sister state which had been *first established* in New York by the New York producers of milk.

Two vital distinctions exist vis a vis the *Seelig* situation and the Connecticut beer price affirmation system. First, as the Court of Appeals clearly recognized, there are no Connecticut Breweries. 692 F.2d 275, 276 n.1, App. p. 47a. Hence there are no prices established by any Connecticut beer producer for its product which are then exported to a surrounding state. More importantly, *any* price which is established for use in Connecticut or elsewhere, is established by the brewer and the brewer alone. Connecticut is not the price-establisher. Connecticut has merely informed the price-establisher–the brewer–to stand advised that, while it

remains free to set a price for its product in each of the bordering states, it must anticiapte that its decision will reverberate into Connecticut. That is, once a lowest price is freely decided upon by a brewer for use in another state, that decision is no longer an isolated business judgment which will have no impact in Connecticut.

This "complication of business judgments" formed the essence of one of the brewers' major complaints against the new Connecticut system. The brewers maintained that Connecticut was dislocating the existing beer distribution system and that this constituted an undue burden on interstate commerce. The District Court, relying upon *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), rejected this claim, 532 F.Supp. 1312, 1327, App. p. 31a, and the Court of Appeals found it unnecessary to pass upon any of the Commerce Clause issues raised by the brewers. 692 F.2d 275, 282, App. p. 59a.

Accordingly, and in sharp contrast to the *Seelig* circumstances, we submit it cannot be reasonably advanced that the Connecticut system establishes a price for beer which then travels across sovereign borders. As the District Court aptly put it: "The basic beer pricing decisions which underlie the brewers competitive strategies is left to them. . . ." 532 F.Supp. 1312, 1327, App. p. 32a. Thus, we submit, Connecticut is clearly not guilty of *establishing* a scale of prices for beer, which prices must then be implemented in a sister state. Since, as we view the decision of the Court of Appeals, the basis for the court's conclusion that the Connecticut system had an extraterritorial thrust was this perception of "price establishment" by Connecticut, then the clear holding of *Seagram* demands that the decision be reversed. For this Court in *Seagram* unequivocally stated, " 'The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not

within that domain which the Constitution forbids' ". *Seagram*, 384 U.S. 35, 43 quoting *Osborn v. Ozlin*, 310 U.S. 53, 62, 60 S.Ct. 800, 84 L.Ed. 1074 (1940).

The Court of Appeals, however, seems to have focused upon that portion of the *Seagram's* decision which warned that "alleged extraterritorial effects" of an affirmation law could present future problems of concrete dimensions. 384 U.S. 35, 43. We submit that overlooked by the Court of Appeals was a preceding sentence of the *Seagram* decision which effectively defined the "thrust" of which this Court was speaking: "The serious *discriminatory effects* of Section 9 alleged by appellants *on their business outside New York* are largely matters of conjecture." 384 U.S. 35, 43 (Emphasis added). Thus we conclude this Court was referring to effects worked upon a business in one state by the operation of another state's law. But such allegations were not only raised by the brewers, but exhaustively treated and dismissed by the District Court and virtually ignored by the Court of Appeals.

The issue which the Court of Appeals seizes upon is not so much the effect on the brewers' out-of-state business practices, but the perceived effect upon another state's sovereign power to control the sale of liquor within its borders. And the brewers did raise such an issue in the trial court. The District Court dismissed these claims saying: (a) the brewers had no standing to litigate the issue of a state's Twenty-first Amendment powers; and (b) that the *Seagram* decision settled the issue of whether a state may constitutionally demand prices "as low as" the prices offered elsewhere. 532 F.Supp. 1312, 1331, App. p. 40a. This issue was not pursued by the brewers in the Court of Appeals and, moreover, was recognized as having been abandoned by the Court of Appeals. 692 F.2d 275, 278 n.9, App. 51a.

We find it significant that while the Court of Appeals declared the Connecticut system unconstitutional, ostensibly

because of the future oriented nature of the Connecticut Beer Price Affirmation Provisions, it finds in *Seagram* authority which "might well validate . . . a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states." 692 F.2d 275, 283-284, App. p. 63a. (Such a requirement is sometimes hereinafter referred to as a Simultaneous Sales Act.) The Court of Appeals, also on the settled authority of *Seagram*, recognizes the validity of a New York type system which requires prices no higher than the lowest charged in a previous month in another state. 692 F.2d 275, 283, App. p. 61a. In both instances the court seemingly discerns no extraterritorial thrust.

Yet, even the brewers in their arguments to the District Court recognized that a purely Simultaneous Sales Act would mandate that prices in a bordering state may not be lower than those *then* current prices in Connecticut. This effective requirement of "no higher than the then lowest" dictates that a bordering state cannot enjoy a lower price at *any* point in time. We submit that logic tells us that this constitutes an extraterritorial thrust even in such a system. Yet the Court of Appeals finds no similarity and impliedly, at least, condones the implementation of this type of system.

Again, a consideration of a replica of the *Seagram* system, with its attendant monthly backward glance to determine "lowest price" leads ultimately to the conclusion that an extraterritorial thrust is inevitable. If all or most states adopt such a system, then very quickly the lowest price is locked-in, or permanently fixed. Perhaps the best way to demonstrate this effect is through the following hypothetical chart:

| | New York | Mass. | Rhode Island | Conn. | |
|---|---|---|---|---|---|
| Jan. | $50 | $60 | $70 | $80 | (price |
| Feb. | $60 | $50 | $50 | $50 | per |
| March | $50 | $50 | $50 | $50 | unit) |

In the above example, we assume that in January all four states adopt a *Seagram* type affirmation statute. It will take one month for the systems to interact, but in January the "lowest" price existed in New York at $50. Thus in February the other three states pick up this price and by March all four now have the same lowest price which *cannot* go higher. The price can only go down but never up. Such consequences probably contributed to or compelled, a change in the New York law. As this Court will observe, the New York law is no longer as it was at the time of the *Seagram* decision but is instead virtually identical to the Connecticut system presently under review. See New York Alcoholic Beverage Control Laws, Sec. 101-b. Thus, in a very real sense, under any of the three systems discussed (two of which have the blessing of the Court of Appeals) there exists an extraterritorial thrust.

We anticipate the argument, based in the stated misgivings of the Court of Appeals with the requirement that a brewer may not sell its product in another state at a price lower "than that which it has *previously announced* it will charge" in Connecticut, that this distinguishes the Connecticut system and renders it unconstitutional. But if the simultaneous sales system and the *Seagram* type do not constitute impermissible conduct, then absent compelling and convincing arguments, it seems unreasonable to simply conclude that the Connecticut statute regulates beer sales in other states. Undeniably the Connecticut statute impacts out-of-state sales but only slightly more in degree than the simultaneous sales statutes. The *Pike* test seems here particularly appropriate:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If

> a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.
>
> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed. 2d 174 (1970) (Citation omitted).

Clearly the District Court found that there was a legitimate local purpose, i.e., raising revenue for the State of Connecticut. 532 F.Supp. 1312, 1316-1317, App. p. 9a. Evidently the Court of Appeals thought the balance was tipped against the state by the brewers' loss of some price flexibility, for in distinguishing *Seagram*, the Court laid much emphasis upon the following: "Thus the New York law, although it affected the prices that manufacturers would choose to set in other states, did not limit the freedom of a manufacturer to raise or lower prices in any other states." 692 F.2d 275, 283, App. p. 61a.

First, the implication that the brewers are unable to *raise* prices in any other state is clearly in error. The Connecticut laws have no effect whatsoever on the ability of a manufacturer to raise its respective price at any time in any other state. Undeniably, a brewer cannot lower its price in a contiguous state during the thirty day posting period in Connecticut. (We remind the Court of the severable nature of the Connecticut laws discussed *supra* at p. 11, 12). It is also undeniable that this constitutes the loss of some pricing flexibility *in the brewer*. But this type of argument, it seems to us, relates to those fully advanced by the brewers and just as fully treated by the District Court, alleging the "complication of business judgment" issue as creating an undue burden on interstate commerce. We submit that any fair

application of the *Pike* test must result in a conclusion that a loss of the ability to lower prices for thirty days is not so drastic an interference so as to counter-balance and out-weigh the state's right to generate in-state sales thereby increasing revenue for Connecticut.

Even in *Edgar v. Mite Corp.*, ——— U.S. ——— 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982), this court applied the *Pike* balancing test, but found "nothing to be weighed in the balance to sustain the law". 102 S.Ct. 2629, 2642. However, in *Edgar* the Illinois' law prevented a tender-offer from proceeding *anywhere*, without Illinois' prior approval, if at least 10% of the securities subject to the offer were owned by Illinois residents. The difference between the *Edgar* situation and the Connecticut system is aptly pointed out in the Court of Appeals' decision: "Because the Illinois Act purports to regulate directly *and to interdict* interstate commerce, including commerce wholly outside the state, it must be held invalid. . . ." 692 F.2d 275, 280 n.10, App. p. 55a, citing *Edgar*, 102 S.Ct. 2629, 2641 (opinion of White, J.) (Emphasis added).

We, of course, insist that there is no "direct regulation" of beer sales in surrounding states. Assuming, *arguendo*, that there is such regulation, it is indirect and incidential. Moreover, there simply is no "interdiction" of interstate beer sales. The brewers need not obtain the prior approval of Connecticut before they can establish a price or consumate a sale at any price in a border state. The Connecticut law simply tells the brewer that its out-of-state pricing decision will have binding impact upon its Connecticut prices. This leaves the brewer with some choices to make–but choices of a business judgment nature. The brewer must obviously initiate some adjustments in its pricing decisions and must keep a hitherto unconcerned eye upon Connecticut because now, for the first

time, those border state pricing decisions are no longer isolated by geographic boundaries.

The "interdiction" of *Edgar* prevented a tender offer from being made without the approval of Illinois. The Company was powerless to prevent the occurrence (sale of securities to Illinois residents) which in turn triggered the operation of the statute and ostensibly vested Illinois with the power to forbid the tender offer. In sharp contrast to this absolute bar to the conduct of interstate business stands the Connecticut affirmation system. Under this system the brewer remains firmly in control to exercise its options. Obviously, the brewer can establish a lowest price in a border state with the full knowledge that when it does so it has simultaneously set the minimum price in Connecticut. Significantly however, and distinct from the *Edgar* situation, the brewer is *not* powerless to prevent the occurrence which triggers the operation of the statute. That is, the brewer, every thirty days, decides whether or *not* to offer its product for sale in Connecticut for the succeeding thirty days. Quite obviously, the Connecticut law does not and cannot compel a brewer to sell its products in the state.

In a previous portion of this brief we quoted the Court of Appeals' presentation of how it perceives the Connecticut statutes to have an extraterritorial thrust (see supra at p. 11). We would, at the risk of redundancy, reproduce the Court's formulation, amended by an added emphasized portion, which, we submit, completes and thus renders precise that formulation:

> "In other words, these sections tell a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, *if, and only if, it desires also to sell the same product in the State of Connecticut for such a given month*, it may not do so

> at a price lower than that it has previously announced it will charge to Connecticut wholesalers."

Viewed in this light it then becomes apparent that it is the brewer, and the brewer alone, who decides what, if any, impact the Connecticut statutes will have. The brewer, in the exercise of its free choice decides if the Connecticut law will operate upon its independent pricing decision. In order to avoid the operation of the Connecticut statutes a brewer may decide not to sell its products in Connecticut during a thirty day period. And, as the District Court observed, withdrawal from a particular market does not necessarily constitute an impermissible burden on commerce. 532 F.Supp. 1312, 1327, App. p. 31a. The District Court relied upon, as we do, this Court's clear proclamation in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128. Surely, the option of withdrawing from the Connecticut market for a thirty day period is far less drastic than the complete divestiture ordered by the Maryland law and upheld by this Court.

The significance of the impact of the Twenty-first Amendment to the Constitution was not lost upon either of the courts below. Unfortunately, the Court of Appeals, after recognizing the broad sway given to the individual states to "ban, restrict, or otherwise regulate importation and in-state traffic in alcoholic beverages" by virtue of that Amendment, simply viewed the Connecticut system as an unauthorized attempt to "regulate the sale of liquor outside of its own territory." 692 F.2d 275, 280, 281, App. p. 56a.

We submit that the very cases cited by the Court of Appeals constitute more than sufficient authority for Connecticut to adopt, implement and enforce the Beer Affirmation Provisions. As we previously noted the brewers are free to decide not to sell their products in Connecticut during any thirty day period. This option results because Connecticut

has imposed a condition upon the conduct of the business of selling alcoholic beverages *in* the state. While the Court of Appeals has categorized our position as being that ". . . the Twenty-First Amendment to the Constitution gives the State carte blanche to regulate the prices at which plaintiffs may sell beer in Connecticut, . . ." 692 F.2d 275, 278, App. p. 50a, we make no such broad assertion. In these circumstances, Connecticut claims no more authority than this Court has unequivocally determined that the Amendment confers upon each sovereign state: "Just two Terms ago we took occasion to reiterate that 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution or consumption within its borders.' " *Seagram*, 384 U.S. 35, 42, citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964).

As we hope we have previously demonstrated, we do not claim that this means that a price which is composed or established *by* Connecticut may constitutionally be exported across state lines. We do assert that *Seagram* is authority for the proposition that Connecticut, since it may prohibit the sale of intoxicating liquors entirely within its borders, *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936), may attach conditions to the right to sell such liquors in-state. We submit that here, Connecticut has done no more than "restrict the importation of intoxicants destined for distribution or consumption in its borders." *Seagram*, supra. This "restriction", imposed by the Connecticut General Assembly in the affirmation provisions, assumes the form of a condition precedent attached to the exercise of the right to sell intoxicating beverages in Connecticut. The law demands *only* that the brewer offer its product in Connecticut at the lowest price it has selected for use in one or more of the surrounding states. Connecticut law, however, does not say to the brewer, "You must bring

your product to Connecticut and you must sell your product at the lowest price." Connecticut law does say to the brewer, "*If* you freely determine to bring your product to Connecticut and offer it for sale therein during a particular month, you must bring it at the lowest price." It is then, we submit, entirely accurate to say that any extraterritorial effect of the Connecticut law is triggered, if at all, by the free choice of the brewer and not simply by the mere existence or self-execution of the Connecticut statute.

We assert that the *Seagram* case convincingly establishes a state's authority to impose this "condition precedent" upon those whom it licenses to sell alcoholic beverages within its borders. Indeed the Court of Appeals recognized the differing degree of authority possessed by a state because of the Twenty-first Amendment. Nowhere is this distinction more vividly portrayed than in the contrast between *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391, 59 S.Ct. 254, 83 L.Ed. 243 (1939) and *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976). In the latter, it was determined that a state could not impose a prohibition upon the local sale of milk produced in a sister state because of reciprocal discrimination against its own milk in such sister state. However, the former case, in recognition of the authority conferred by the Twenty-first Amendment, clearly indicates that a state may impose identical restrictions when the product is liquor in general, and beer in particular.

## CONCLUSION

For all the foregoing reasons, we urge this Court to note probable jurisdiction. In the alternative and if appropriate, we urge this Court to enter an order summarily reversing the judgment of the U.S. Court of Appeals for the Second Circuit and affirming the original judgment of the U.S. District Court for the District of Connecticut.

Respectfully Submitted

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March 4, 1983

No.

# In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN F. HEALY, *et al.*

*Appellants,*

*v.*

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*

*Appellees,*

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## APPENDIX

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## Appendix A
## UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| UNITED STATES BREWERS ASSOCIATION, INC., *et al* | : | |
| *v.* | : | CIVIL No. H-81-836 |
| JOHN F. HEALY, *et al* | : | |

## RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiff, United States Brewers Association,[1] brings this action challenging the constitutionality of sections 30-63a(b),[2] 30-63b(b)[3] and 30-63c(b)[4] of the Connecticut

[1]In addition to the United States Brewers Association (USBA), there are several other plaintiffs, all brewers and importers of beer. Only Anheuser-Busch, Inc. has appeared separately and filed its own motions and briefs. All parties join in USBA's motion for summary judgment, and for convenience I will refer to them collectively as plaintiff(s) or brewers.

[2]Liquor Control Act (LCA) Conn. Gen. Stat. §30-63a(b), as added by Section 11 of Public Act No. 81-294, provides as follows:

> No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in Section 30-1, at a bottle, can or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

[3]LCA §30-63b(b), as added by Section 12 of Public Act No. 81-294, provides as follows:

> At the time of posting of the bottle, can and case price

Liquor Control Act, Connecticut General Statutes, Title 30, Ch. 545, as amended by Public Act No. 81-294, June 8, 1981 (hereafter referred to as the "beer price affirmation act," "the statute," or "the Act"). Plaintiff is a non-profit corporation representing brewers and importers of beer, many of whom sell beer in Connecticut and the three bordering states, New York, Massachusetts, and Rhode Island. Plaintiffs request a declaratory judgment holding these sections of the

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required by Section 30-63, as amended by Section 10 of this act, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the Department of Liquor Control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that the bottle, can or case price to the wholesaler permittees during the period of the posting will be no higher than the lowest price at which each such item of beer is or will be sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state, at any time during the calendar month covered by such posting.

[4]LCA §30-63c(b), as amended by Section 13 of Public Act No. 81-294, provides as follows:

> In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floorstock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. . . . A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes, approved by the Division of Liquor Control, of his brand which he offers to any wholesaler in any state bordering this state.

price affirmation statute unconstitutional as applied to them on the grounds that the Act violates the Supremacy Clause (art. VI, cl. 2) and the Commerce Clause (art. I, §8, cl. 3) of the United States Constitution.[5] In addition, plaintiffs seek a permanent injunction restraining the defendants, the members of the Department of Liquor Control of the State of Connecticut, from enforcing the provisions of the statute.[6] Jurisdiction in this court is based on 28 U.S.C. §1331(a) which provides for federal court jurisdiction over civil actions arising under the laws or Constitution of the United States, and 28 U.S.C. §1337 which confers jurisdiction over any civil action arising under any act of Congress regulating commerce.

The plaintiffs have submitted affidavits from seven brewers and six importers outlining the structure of the beer market in general and in the four-state market in particular. The affidavits outline the possible effects of the beer price affirmation statute on the brewers' business, and indicate the variety of responses open to the brewers. Plaintiffs have also submitted an affidavit of Dr. Bruce Owen, an economist, supporting their position that the statute will have anticompetitive effects on the beer industry in the four-state area. On November 10, 1981, a hearing on plaintiffs' motion for preliminary injunction was held. Subsequently, in a ruling

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[5]Plaintiffs also present claims under the Due Process Clause and the twenty-first amendment. These secondary claims will be dealt with later in this opinion. *See infra* at 17, 35-37.

[6]The statute took effect on January 1, 1982, but the contested provisions have just become applicable, since the first price posting under the Act was not until January 13, 1982, for prices effective on February 1, 1982. See letter of John F. Healy, Chairman, Liquor Control Commission, dated November 23, 1981.

dated November 25, 1981, the court denied the motion for a temporary injunction, finding that plaintiffs had failed to demonstrate either irreparable injury or a likelihood of success on the merits. *United States Brewers Association v. Healy*, Civil No. H-81-836, Ruling on Plaintiffs' Motion for Preliminary Injunction (D. Conn. Nov. 25, 1981). The brewers then moved for summary judgment in an effort to obtain an expedited resolution of this matter. The defendants responded with a cross-motion for summary judgment, supported by the affidavits of Charles W. Kasmer, a defendant and Secretary of the Department of Liquor Control, and Dr. Paul Weiner, an economist. In addition, the defendants submitted a statement of material facts pursuant to local rule 9(d) contesting some of the "material facts not in dispute" contained in plaintiffs' 9(d) statement. The parties waived oral argument on these motions in order to hasten the court's decision.

## I. *Summary Judgment Principles*

> The requirements for granting summary judgment are well established. There must be "no genuine issue as to any material fact," and a party must be "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The burden is on the moving party 'to demonstrate the absence of any material factual issue genuinely in dispute.' *Heyman v. Commerce & Industry Insurance Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975)." *American International Group, Inc. v. London American International Corp.*, No. 81-7237 (2d Cir. Nov. 13, 1981).

*Schwabenbauer v. Board of Education*, No. 80-7853, slip op. 505, 519, (2d Cir. Dec. 17, 1981). "A material fact is one which may affect the outcome of the litigation," *Commodity Futures Trading Commission v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979) (citation omitted) or which "constitutes a

legal defense to an action." *Kennett-Murray Corp. v. Bane*, 622 F.2d 887, 892 (5th Cir. 1980) (citation omitted).

> Not only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy as to the inferences to be drawn from them. *E.g., Phoenix Savings & Loan, Inc. v. Aetna Casualty & Surety Co.*, 381 F.2d 245, 249 (4th Cir. 1967). In determining whether or not there is a genuine factual issue, the court should resolve all ambiguities and draw all reasonable inferences against the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). . . . [T]he fact that both sides have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other. *E.g., Home Insurance Co. v. Aetna Casualty & Surety Co.*, 528 F.2d 1388, 1390 (2d Cir. 1976) ("The fact that both sides . . . sought summary judgment does not make it more readily available."); *Rhoads v. McFerran*, 517 F.2d 66, 67 (2d Cir. 1975).

Schwabenbauer, slip op. at 519-20.

"[The Court does] not assume that no material facts remain in dispute simply because both parties moved for summary judgment." "*Matter of Citizens Loan & Savings Co.*, 621 F.2d 911, 913 (8th Cir. 1980) (citation omitted). Rather, the court must evaluate each party's motion on its own merits to determine if summary disposition is appropriate.

"[I]t is well settled [however] that even genuine disputed issues of fact will not preclude summary judgment unless they are material to the legal issues in the case." *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386, 392 n.5 (7th Cir.) (citation omitted), *cert. denied*, ———

U.S. ———, 102 S.Ct. 144 (1981); *accord, British Airways Board v. Boeing Co.*, 585 F.2d 946, 952-53 (9th Cir. 1978), *cert. denied* 440 U.S. 981 (1979).

Applying these principles to the instant matter, the court concludes that this is an appropriate case for summary judgment. The defendants' objections to certain of the statements alleged to be "material facts not in dispute" in plaintiffs' 9(d) statement do not bar granting summary judgment, because these statements are either not material, or not facts at all. The objections to the brewers' statements relating to the nature of the beer industry are not material to the resolution of the legal issues presented by these motions.[7] The separate 9(d) statement submitted by Anheuser-Busch, Inc. concerns itself solely with the purpose behind the beer price affirmation statute. To th extent that Anheuser-Busch's statements are factual, the defendants' objections are not material.[8] To the extent the 9(d) statement states arguments or conclusions, the court is entitled to disregard them.

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[7]An example of this group of immaterial disputed facts is found in paragraph two of defendants' 9(d) statement. Whether or not beer is perishable, and what that term means, have absolutely no bearing on the legal issues in this case. Similarly, the other disputed facts about the price elasticity of beer, the market breakdowns, the nature of competition, etc., are not material.

[8]The court finds that paragraph one of Anheuser-Busch's 9(d) statement is a material fact not in dispute. Defendants' objection is a linguistic quibble, nothing more. Paragraph two is also material and not disputed, with the exception of the statement "regardless of competitive conditions." As this is not a factual statement, but an argument, the dispute is not material. Paragraph three states that "[a]s a result of these provisions, Connecticut wholesalers will receive a legislatively mandated competitive advantage over competing border state wholesalers and retailers." It continues, saying that whatever Anheuser-

The statements of material facts submitted by the parties, along with the supporting affidavits, reveal the following pertinent facts:

1. Connecticut residents cross state borders in significant numbers to purchase beer at lower retail prices.[9]

2. The purpose of the beer price affirmation statute is to lower the price of beer to Connecticut consumers[10] thereby increasing the purchase of beer by Connecticut residents within the state, and generating increased tax revenues.[11]

3. There are no breweries in Connecticut.[12]

4. In each of the four relevant states the beer distribution system consists of three tiers as required by state

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Busch does in response to the statute "will damage the competitive position of bordering state wholesalers and retailers *vis-a-vis* their Connecticut competitors and will result in injury to Anheuser-Busch. . . ." It is reasonably clear that neither of these statements are primarily factual, insofar as they state conclusions and predict future events. Because these parts of paragraph three are not statements of material facts not in dispute, the court will disregard them. The rest of paragraph three is arguably factual but is not material and need not be considered any further.

[9]Statement by Anheuser-Busch of Material Facts as to Which There is No Genuine Issue to be Tried (A-B's 9(d) statement) ¶1; Statement of Material Facts by Defendants John F. Healy, Et Al. (Defendants' 9(d) statement) ¶32.

[10]Defendants' 9(d) statement ¶33.

[11]A-B's 9(d) statement ¶1; Defendants' 9(d) statement ¶¶12, 33.

[12]United States Brewers Association Statement of Material Facts Not in Dispute (USBA's 9(d) statement) ¶3.

licensing laws: brewers and importers, wholesalers, and retailers.[13]

5. The brewers and importers doing business in the four-state area have the following choices of how to comply with the beer price affirmation statute:[14]

   (a) the Connecticut price can be lowered to equal the lowest price in a bordering state;

   (b) lower prices in border states can be raised to the Connecticut level;

   (c) the brand or brands that sell at lower prices in the border states can be withdrawn from Connecticut;

   (d) the brand or brands that sell for lower prices in the border states can be withdrawn from the markets where the price is lower than the Connecticut price.

The court takes judicial notice of the following facts:

1. Connecticut's statutory scheme regulating the liquor industry contains the following provisions:

A. *Price Posting.* All brewers and importers of beer must file with the Department of Liquor Control a schedule of prices that they will charge to Connecticut wholesalers. Conn. Gen. Stat. §30-63(c), Pub. Act 81-294 §10(c). These "posted prices" apply to all sales to Connecticut wholesalers. They are subject to changes that can be filed on or before the thirteenth day of any month to become effective on the first

[13]USBA's 9(d) statement ¶10.

[14]USBA's 9(d) statement ¶23.

day of the next month. The posted prices are per bottle, can, or case prices for every brand of beer in every size bottle or can without distinction based on the way the bottles or cans are packaged or even whether they are further packaged. Connecticut wholesalers must also post their prices. Posted prices cannot be changed between monthly posting dates.

B. *Discounts.* Neither brewers nor wholesalers may offer discounts or other inducements of any kind to their customers. Conn. Gen. Stat. §30-63(b), Pub Act. 81-294 §10(b). However, the Department of Liquor Control allows beer price alterations by brewers and importers known in the industry as a "post-off." A "post-off" is the functional equivalent of a temporary discount, designed to spark sales.[15] The posted price in Connecticut is the governing price on all sales of beer regardless of quantity or other circumstances of a particular sale.

C. *Price Differentiation Among Customers.* Neither brewers nor wholesalers may differentiate among their customers in respect of price or other terms of trade. Conn. Gen. Stat. §30-63(b), Pub. Act 81-294 §10(b).

D. *Sales Below Cost.* Sales below cost by brewers, importers, and wholesalers are prohibited. Conn. Gen. Stat. §30-63(b), Pub. Act 81-294 §17.

E. *Resale Prices.* Suggested consumer resale price schedules must be filed; compliance by retailers is not mandatory. Conn. Gen. Stat. §30-64, Pub. Act 81-294 §15.

F. *Minimum Markups.* Minimum markups for wholesale and retail beer prices which were required by law have been

[15]Affidavit of Charles W. Kasmer (Kasmer Aff.) ¶¶4-6.

repealed by Public Act. No. 81-294 §21, effective January 1, 1982.[16]

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[16]The beer price affirmation provisions are only one part of a larger statute which repealed the legally required minimum markups on alcoholic beverages. The title of the Act, "An Act Concerning the Elimination of Minimum Markups on Liquor Sales," indicates that repeal of minimum markups was the primary concern of the legislature. (See Remarks of Rep. Carragher, House (H)-68.) The stated purpose of the repeal was to benefit consumers by lowering prices of alcoholic beverages, thereby generating increased tax revenues for the state through increased sales. (See Remarks Rep. Carragher, H-70, 224-25; Rep. Moynihan, H-119; Sen. Schneller, Senate (S)-46.) Connecticut, due to its extensive regulations maintaining high prices and otherwise restricting free competition, has more retail stores per capita than any other state in the Union. (See Remarks Sen. Skelley, S-28; Sen. Johnson, S-35.) Many of these are so-called "Mom and Pop" stores, whose economic survival was thought to be dependent on the minimum markup laws. (See Remarks Sen. Johnson, S-36; Sen. Mustone, S-22, 24.) The legislature, in repealing minimum markups, was concerned with cushioning the impact of free competition on the small retail stores. (See Remarks Sen. Ballen, S-109-110; Rep. Carragher, H-224-227.) To this end, the legislation included several measures designed to protect small retailers from competition *within* the state. These so-called "safeguards" include: (1) a five-year moratorium on the issuance of new retail permits (Rep. Carragher, H-70, 219, 225; Sen. Mustone, S-18; Sen. Schneller S-44-45); (2) after the expiration of the five-year moratorium, new retail permits may be issued only at the rate of one per 2,500 people in population growth (Sen. Mustone S-19; Sen. Schneller S-45; Rep. Carragher H-219, 225); (3) abolition of one day permits for organizations, thereby requiring social groups to make quantity purchases from retailers (Sen. Mustone S-19; Rep. Carrgaher H-225); (4) retailers may purchase from wholesalers in another territory if the product is unavailable from their distributor or if the price is lower elsewhere (Sen. Mustone S-19; Rep. Carragher H-220-221, 226); (5) wholesalers cannot price differentiate among retailers (Rep. Carragher H-225); (6) retailers

G. *Exclusive Territories.* Wholesalers are prohibited from selling to retailers located outside their designated territories.[17] However, a wholesaler's territory is determined by the brewer or importer under Conn. Gen. Stat. §§30-17 and 30-63, and may be as small or large as the brewer or importer chooses.[18]

H. *Bottle Bill.* The Connecticut bottle and can return bill requires that all beer (and soft drink) bottles and cans be redeemable for at least five cents, and also requires that brewers and importers put special labels on cans and bottles and special non-detachable tabs on cans. Conn. Gen. Stat. §§22a-78, 22a-88.[19]

2. The price affirmation statute requires the monthly posting of prices for beer by brewers and importers, and adherence to those prices during the month governed by the posting.[20] The relevant portions of the Connecticut statute may be summarized as follows:

A. Each brewer selling in Connecticut must affirm that its prices to Connecticut wholesalers are no higher than the

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cannot price below cost (Rep. Carragher H-225); (7) no quantity discounts may be offered by brewers or wholesalers (Sen. Mustone S-21; Rep. Carrgaher H-226); (8) no person can own or have an interest in more than two retail liquor stores (Sen. Schneller S-45; Rep. Carragher H-220, 225-26); and (9) a three-day period in which wholesalers may revise their posted prices *downward* to compete with the lowest prices posted (Sen. Mustone S-20; Rep. Carragher H-220, 226).

[17]Department of Liquor Control Reg. §30-6-37.

[18]Kasmer Aff. ¶8.

[19]USBA's 9(d) statement ¶20; Defendants' 9(d) statement ¶9.

[20]Conn. Gen. Stat. §30-63(c), Pub. Act 81-294 §10(c).

lowest price it sells or offers to sell, during the month following, to any wholesaler in the three bordering states; sales in Connecticut at higher than this lowest price are prohibited.[21]

B. "Lowest price" is calculated net of all discounts, allowances and inducements of any kind offered to any bordering state wholesaler; due allowance can be made for differentials attributable to differences in state taxes and the actual cost of delivery.[22]

C. No allowance is made for different package configurations (*e.g.* a case of six-packs versus a case of loose cans or bottles); in addition, for any brand a brewer offers for sale in Connecticut, it must offer to Connecticut wholesalers all the sizes of that brand offered to wholesalers in the three bordering states.[23]

## II. *Beer Marketing in the Four-State Area*

Plaintiffs claim that the price affirmation statute impermissibly burdens interstate commerce insofar as it disrupts their business practices within the four-state area. To better understand the nature of plaintiffs' argument, it is necessary to provide some background on the present marketing practices of the brewers and importers, and the regulatory schemes of the bordering states.

All four states require licenses for those who market beer at each of the three levels involved; brewers, distributors and retailers. The net effect of this scheme is to entirely preclude

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[21]Conn. Gen. Stat. §§30-63a(b), 63b(b), Pub. Act 81-294 §§11, 12.

[22]Conn. Gen. Stat. §30-63c(b), Pub. Act 81-294 §13.

[23]Conn. Gen. Stat. §30-63c(b), Pub. Act 81-294§13.

sales by wholesalers in one state to retailers in another. At this point the uniformity ends. Massachusetts is similar to Connecticut in that it does have a price posting requirement applicable to brewers and importers,[24] although there is no requirement that the posted price be equal to the lowest price charged for the same item in some other place. Massachusetts, like Connecticut, also prohibits brewers or wholesalers from differentiating among their customers in respect of price or other terms of trade,[25] prohibits sales below cost by brewers, importers, and wholesalers,[26] and requires that consumer resale price schedules be filed, although compliance by retailers is not mandatory in either state.[27] And last, Massachusetts, like Connecticut, has recently passed a bottle bill which will require that cans and bottles be redeemable.[28]

In New York and Rhode Island brewers and importers, unfettered by extensive regulation, can and do offer a range of price discounts to wholesalers for a variety of reasons. Discounts are offered for quantity sales, sales to special

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[24]*See* Mass. Ann. Laws ch. 138 §25B, and Conn. Gen. Stat. §30-63(c), Pub. Act 8-294 §10(c). No change can be made in the posted price in Massachusetts or Connecticut except where there is a typographical error in the posting. The posted price, whether promotional or not, must continue for a full thirty days. Affidavit of Donnell E. Balmert (Balmert Aff.) C-5, ¶11.

[25]Mass. Ann. Laws ch. 138 §25A(a), and Conn. Gen. Stat. §30-63(b), Pub. Act 81-294 §10(b).

[26]204 Code Mass. Regs. §2.04, and Conn. Gen. Stat. §30-68i, Pub. Act 81-294 §17.

[27]Mass. Ann. Laws ch. 138 §25C, and Conn. Gen. Stat. §30-64, Pub. Act 81-294 §15.

[28]*See Boston Globe*, Tues. Nov. 17, 1981, pp. 1, 22. The Massachusetts statute takes effect on January 17, 1983. In addition to Massachusetts and Connecticut, five other states, Maine, Vermont, Oregon, Michigan and Iowa have bottle bills.

cusomers (the so-called home distributors in New York), to encourage advertising by wholesalers, for purposes of test marketing new products, and for promotional purposes.[29]

At present, the brewers' pricing policies in New York and Rhode Island are characterized by a good deal of flexibility and variability. The New York City market is the most highly competitive,[30] and accordingly, prices there are often the lowest in the four-state region.[31] Prices charged by brewers and importers to Connecticut wholesalers are neither the highest nor the lowest in the four-state area.[32] Retail prices in Connecticut, however, are generally, higher than those in the bordering states.[33]

The beer price affirmation statute would force some changes in the current marketing practices employed by the brewers and importers. The statute requires that the brewers sell to

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[29]Price promotions in New York must last at least six months. (Balmert Aff. C-6, ¶13.) The functional equivalent of price promotions can be achieved in Connecticut through the use of the "post-off." (Kasmer Aff. ¶¶4-6.) Discounts may also be offered for particular package configurations, *e.g.* cases consisting of loose or individual bottles and cans. In Connecticut, posted prices must be per case, bottle or can and prices may not vary according to how the bottles or cans are packaged. Massachusetts does allow price promotions. (Affidavit of Michael J. LaMonica (LaMonica Aff.) A-10, ¶27.)

[30]LaMonica Aff. A-5, ¶14; Balmert Aff. C-7, ¶16; Affidavit of John D. Reifenrath D-4, ¶15.

[31]The upstate New York region is also highly competitive, due to the presence of Genessee, a popular regional beer. Narragansett provides similar intense local competition in Rhode Island. LaMonica Aff. A-7, ¶18; Affidavit of Dan Daly E-6, ¶12.

[32]USBA'S 9(d) statement ¶22.

[33]USBA's 9(d) statement ¶21.

Connecticut wholesalers at the lowest price the same item is being sold anywhere in the four-state region. If a particular brewer's lowest price in the region for a given item is being offered to a home-distributor[34] in New York City, the Connecticut statute would require that brewer to offer the item for the same price for the entire Connecticut market. The brewers and importers argue that competitive conditions do not justify selling at such low prices in Connecticut, and claim that by doing so they will suffer serious economic losses. Alternatively, the plaintiffs argue that if they raise their prices in the competitive New York City area they will be priced out of the market and will lose a significant portion of their business.[35]

In addition to its effect on prices, plaintiffs maintain that the statute will limit competition in the four-state area. Their argument here is that the statute will effectively preclude the brewers from lowering prices elsewhere once the price is posted in Connecticut. This loss of price flexibility will disrupt the current practice of offering short-term price discounts to wholesalers. In short, the plaintiffs argue, the Act will cause the "dislocation of marketing choices or the entire loss of markets in which investments have been made."[36]

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[34]Home distributors or vendors appear to be unique to New York. These home vendors apparently control large portions of the New York City market, dealing in large quantity sales to both wholesale and retail customers. They currently receive significant discounts from the brewers, which are passed along to quantity purchasers. *See* Affidavits of Dan Daly E-5, ¶10; Ralph Walder B-8, ¶13; and John Reifenrath D-5, ¶16.

[35]A third alternative is to withdraw from the Connecticut market. Obviously this might have economic consequences for the brewers which they hope to avoid.

[36]USBA's 9(d) statement ¶24.

## III. *Plaintiffs' Contentions*

Plaintiffs' Commerce Clause argument is directed at both the purpose and effect of the Act. They argue, relying on comments from the legislative debates on the statute, that the legislative intent was to "protect Connecticut wholesalers and retailers from out-of-state competition."[37] Insofar as the purpose and effect of the price affirmation statute is to benefit local interests by discriminating against out-of-state concerns, it is "protectionist" legislation, constituting a *per se* violation of the Commerce Clause. *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

The other prong of the Commerce Clause argument focuses only on the *effect* of the statute. Thus, even if the statute is evenhanded on its face, it may not stand if the burden it imposes on commerce is clearly excessive in relation to legitimate local interests. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The brewers argue that the restrictions on price flexibility and the disruptive effects on their market practices are substantial burdens on interstate commerce, not justified by any legitimate state interest.[38] Additionally,

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[37]Anheuser-Busch's Memorandum in Support of its Motion for Summary Judgment (A-B's Brief on Sum. J.) at 3.

[38]The brewers argue that even if reducing beer prices is a legitimate state goal, the statute is not designed to achieve it, since it does not ensure that the reduction in price to Connecticut wholesalers will be passed along to retailers and consumers. *See* USBA's Brief in Support of Motion for Preliminary Injunction at 48. If, however, the price reduction is not passed along, then Connecticut consumers will continue to purchase beer out of state, and the benefit to Connecticut retailers and wholesalers will not materialize. Only if the prices fall low enough to induce Connecticut consumers to buy within the state can the statute even arguably disadvantage out-of-state businesses. It thus does plaintiffs little good to argue that the statute is ill-designed to achieve the goal which they argue makes it unconstitutional. *See* note 53 *infra*.

plaintiffs argue that to the extent the statute reduces the flow of consumers across state lines to purchase beer it imposes an impermissible burden on interstate commerce.

The plaintiffs' second major contention is that the statute violates the Supremacy Clause because it compels a violation of the Sherman Antitrust Act, 15 U.S.C. §1. The brewers argue that the Connecticut law requires them to "fix minimum prices [they] will charge for beer in the states bordering Connecticut and to maintain those minimum prices until they are changed in accordance with Connecticut's monthly price posting requirements." In addition, they argue, the Act "necessitates a common refusal to deal with the competitors of some Connecticut beer wholesalers on terms more favorable than those offered to the Connecticut wholesalers even though more favorable terms would be justified by competitive conditions."[39] The brewers argue that the statute, in combination with the Massachusetts posting requirement, will require the announcement of future maximum prices for Connecticut, also in violation of the Sherman Act. Prices must be posted in Massachusetts on the first day of the month, effective the first day of the month following. These prices must not be lower than the prices posted in Connecticut on the thirteenth of the month, effective the following month. Thus the price posted in Massachusetts becomes, by the interaction of the two statutes, the maximum price which may be posted in Connecticut. These three effects, the brewers argue, constitute coerced violations of the Sherman Act, which are not protected by the doctrine of state immunity under *Parker v. Brown*, 317 U.S. 341 (1943).

Plaintiffs also advance two secondary arguments in support of their constitutional claims. First, that the price

[39]USBA's Memorandum in Support of its Motion for Preliminary Injunction (USBA's Brief on Pre. Inj.) at 25.

affirmation statute violates the Due Process Clause of the fourteenth amendment by (1) taking the brewers' property without just compensation, and (2) by regulating the beer business in the bordering states. A variation of this latter point is essentially the brewers' second argument: that the statute impermissibly infringes on the twenty-first amendment powers of the bordering states. The court will consider each of these four arguments in turn.

## IV. *Discussion*

### A. *The Commerce Clause*

The starting point in an analysis of the constitutionality of the statute under the Commerce Clause is the twenty-first amendment, the second section of which provides that: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." As the Supreme Court has consistently held, "That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories." *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945) (footnote omitted). State statutes regulating alcoholic beverages are entitled to a presumption of validity in light of the broad scope of power in this area. *California v. LaRue*, 409 U.S. 109, 118-19 (1972). "[T]he second section of the Twenty-first Amendment [however] has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor." *Seagram & Sons v. Hostetter*, 384 U.S. 35, 42 (1966).

The general principles of the Commerce Clause were restated recently in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980):

The Commerce Clause grants to Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const., Art. 1, ¶8, cl. 3. Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade. See, *e.g.*, *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978); *H. P. Hood & Sons, Inc., v. Du Mond*, 336 U.S. 525, 534-538 (1949); *Cooley v. Board of Wardens*, 12 How. 299 (1852). This limitation upon state power, of course, is by no means absolute. In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of "legitimate local concern," even though interstate commerce may be affected. See, *e.g.*, *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978). *Great A&P Tea Co. v. Cottrell*, 424, U.S. 366, 371 (1976). Where such legitimate local interests are implicated, defining the appropriate scope for state regulation is often a matter of "delicate adjustment." *Ibid.*, quoting *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S., at 553 (Black, J., dissenting). Yet even in regulating to protect local interests, the States generally must act in a manner consistent with the "ultimate . . . principle that the state in its dealings with another may not place itself in a position of economic isolation." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). However important the state interest at hand, "it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Philadelphia v. New Jersey*, 437 U.S., at 626-627.

Over the years, the Court has used a variety of formulations for the Commerce Clause limitation upon the

States, but it consistently has distinguished between outright protectionism and more indirect burdens on the free flow of trade. The Court has observed that "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Id.*, at 624. In contrast, legislation that visits its effects equally upon both interstate and local business may survive constitutional scrutiny if it is narrowly drawn. The Court stated in *Pike v. Bruch Church, Inc.*, 397 U.S. 137 (1970):

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*, at 142.

See also *Hughes v. Oklahoma*, 441 U.S., at 336; *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977); *Great A&P Tea Co. v. Cottrell*, 424 U.S., at 371-372; *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443, (1960). The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects. See *Hughes v. Oklahoma*, 441 U.S., at 336; *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456 (1940).

*Id.* at 35-37.

1. *"Protectionist" Legislation*

a. Discriminatory Purpose

Plaintiffs argue that the purpose of the price affirmation statute was to protect local businesss from competition with their out-of-state counterparts.[40] There is nothing in the record, however, to support this contention.[41] As mentioned above, there are no brewers or importers in Connecticut, so the statute could not possibly benefit local brewers. The statute mandates only that Connecticut wholesalers be treated as well as of out-of-state wholesalers with respect to price. The legislative intent to secure "fairer" or "more equal" competition can hardly be characterized as "protectionist" within the meaning of the Commerce Clause. Because neither the statute nor the legislative debates reveal an avowed purpose to discriminate against out-of-state businsses, the statute cannot be invalidated on the basis of its purpose alone.[42]

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[40]A-B's Brief on Sum. J. at 3.

[41]The brewers point to several statements in the legislative debates to support their contention that the statute has a discriminatory purpose. The isolated comments of a few individuals, however, cannot fairly be ascribed to the legislature as a whole. The statements were not those of the sponsors of the bill, nor were they in any way endorsed by the other members. See note 16, *supra*, for a more complete discussion of the legislative debates.

[42]While the Supreme Court has indicated that "economic protectionism" may be shown by "proof of either discriminatory effect, see *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) or of discriminatory purpose, see *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-353 (1977)," *Minnesota v. Clover Leaf Creamery Co.*, _____ U.S. _____, 101 S.Ct. 715, 727 n.15, it is hard to find a case where purpose alone has invalidated a statute. The citation to *Hunt v. Washington Apple* in support of the proposition that discriminatory purpose *alone*

b. Discriminatory Effect

Plaintiffs argue that regardless of its purpose the statute has a discriminatory *effect* on out-of-state *wholesalers* and *retailers*. It is significant that the brewers here are attempting to invalidate the statute not because of its direct effects on them, but because of its indirect effects on third parties. They do not argue that the statute discriminates against out-of-state brewers or importers for the simple reason that there are no Connecticut brewers or importers. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978).

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is sufficient for a finding that a state law is "protectionist" appears to be incorrect. In *Hunt*, the Court stated that

> we need not ascribe an economic protection motive to the North Carolina legislature to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the market place.

*Id.* at 352-53. It is reasonably clear from this quotation that *Hunt* did not involve a finding of discriminatory *purpose*, but rather rested on the existence of a discriminatory *effect*. *See Hunt v. Washington Apple*, 432 U.S. at 351-52. As the Court has recognized, it is a "rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). Because states almost always can, and do, advance legitimate reasons to justify a particular statute, the Court, when considering the *purpose* of a challenged statute, will not be bound by " '[t]he name, description or characterization given it by the legislature or the Courts of the State,' but will determine for itself the practical *impact* of the law." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (emphasis added), quoting *Lacoste v. Louisiana Dept. of Conservation*, 263 U.S. 545, 550 (1924). Invariably the Court infers discriminatory *purpose* only when there is a prior finding of discriminatory *impact*. The inquiry in each case requires first, a determination of whether a discriminatory effect exists, and second, an evaluation of the

The brewers assert that the statute discriminates against out-of-state wholesalers and retailers. It is difficult, however, to conceive of the nature of the alleged discrimination. The statute does not affect any business out-of-state wholesalers or retailers conduct *in* Connecticut, since they are not permitted by law to sell beer within the state. Nor does the statute affect any rights to which out-of-state wholesalers or retailers are entitled. The brewers' argument, based on *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351-52 (1977), that the statute strips out-of-state retailers of a competitive advantage–lower prices–misses the point. Out-of-state wholesalers and retailers are not entitled to receive prices lower than those charged to their Connecticut counterparts. The out-of-state wholesalers and retailers have not, and could not complain that the statute takes from them the advantage of lower prices, when they have no right to those prices in the first place. If Connecticut may constitutionally regulate the prices brewers charge to their wholesalers, then it would seem to follow that the brewers may not complain about the incidental effects on their out-of-state customers when those effects do not implicate constitutional rights. Since it is clear that out-of-state wholesalers

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declared state purpose in light of the means chosen to attain it. Only where the discriminatory effect appears to stem primarily from a design to protect local interests and only secondarily from the pursuit of a legitimate state goal, has the Court inferred a "protectionist" purpose. The Court has rarely, if ever, invalidated a statute on the basis of a discriminatory purpose where there was not proof of actual or inevitable discriminatory effects. While the Court would be entitled to invalidate a statute with the avowed purpose of discriminating against interstate commerce on the assumption that it will have the desired effect, the opportunity rarely presents itself. As noted above, states are rarely so bold as to announce their intention to violate the Constitution, and the instant case is no exception to the rule.

and retailers have no right, constitutional or otherwise, to receive lower beer prices from the brewers, there is nothing about which the brewers may complain. I therefor hold that the beer price affirmation statute does not discriminate against out-of-state businesses and does not, in this respect, contravene the Commerce Clause.[43]

2. *Burden on Interstate Commerce*

Concluding that the statute does not have a discriminatory purpose or effect does not end the inquiry under the Commerce Clause. It still remains to be determined (1) whether the statute burdens interestate commerce, (2) whether such burden is incidental to a regulation effectuating a legitimate local public interest, and (3) whether the burden imposed is excessive in relation to putative local benefits. "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

a. Beer

In the instant case, the first question is whether the beer price affirmation statute burdens interstate commerce in

[43]In the instant case, the most that can be said of the statute is that it will shift some business from out-of-state retailers to in-state retailers. Recently, however, the Supreme Court indicated that "[a] nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominately out-of-state industry to a predominately in-state industry." *Minnesota v. Clover Leaf Creamery Co.*, ——— U.S. ———, 101 S.Ct. 715, 729 (1981). In light of this quotation it is clear that the shifting of business, standing alone, does not render the statute invalid.

beer.[44] I have already noted that the statute does not discriminate against brewers, but it may nevertheless impermissibly burden the movement of beer in interstate commerce. The plaintiffs argue quite forcefully that the statute's effect on their marketing practices will be so disruptive as to constitute a burden on interstate commerce. They point to several specific aspects of their marketing practices which will have to be altered in order to comply with the Connecticut statute.[45] In addition, plaintiffs argue that the price affirmation statute will have "dislocating effects on competition in the bordering states," constituting a substantial burden on commerce.[46] In short, plaintiffs contend the Connecticut legislation places an impermissible burden on interstate commerce.

The constitutionality of a price affirmation statute was upheld by the Supreme Court in *Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966), where it considered an attack on a New York statute which required distillers or distributors to sell liquor to New York wholesalers at the lowest price charged for the same item anywhere else in the *nation*.[47] The Court held that

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[44]It should be pointed out that Connecticut has had nationwide price affirmation for liquor since 1973. *See* Conn. Gen. Stat. §§30-63(a), (b), (c) Pub. Act 73-387.

[45]These include limiting the use of quantity discounts, promotional discounts, advertising discounts, test marketing and restricting the plaintiffs' price flexibility.

[46]USBA's Brief on Pre. Inj. at 37-38.

[47]The New York affirmation statute was also part of a legislative package which repealed minimum markups. It reflected the perception of the New York legislature that prices charged to New York wholesalers were higher than retail prices elsewhere. *See* 384 U.S. at 39 n.9. For a description of the New York statute see 384 U.S. at 39-41.

> [t]he mere fact that §9 [the price affirmation provision] is geared to appellant's pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. The serious discriminatory effects of §9 alleged by appellants on their business outside New York are largely matters of conjecture. . . . It will be time enough to assess the alleged extraterritorial effects of §9 when a case arises that clearly presents them. "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Osborn v. Ozlin*, 310 U.S. 53, 62 [(1940)].

*Id.* at 43 (other citations omitted). The Court's holding, however, was limited by the following language:

> Although it is possible that specific future applications of [the statute] may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that, so considered, the legislation is constitutionally valid.

*Id.* at 52.

Plaintiffs in the instant case argue that it is distinguishable from *Seagram v. Hostetter* on its facts. That is, they claim that the affidavits in this case present the "concrete problems" which were lacking in *Seagram*, and therefore that the time has arisen to consider them. Plaintiffs assert that the Connecticut statute, even if constitutional on its face, is unconstitutional as applied to them in these circumstances. In

addition, the brewers argue that the recent decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), implies that the Court has abandoned or modified its analysis in *Seagram* in favor of stricter scrutiny of state laws regulating alcohol, where they conflict with the federal commerce power.

Plaintiffs' attempts to distinguish *Seagram* on a factual or doctrinal basis are not persuasive.[48] Recognizing that *Seagram* does leave open the possibility of a different result where a stronger factual record of discriminatory effect exists, I do not believe the brewers have presented such a case.[49]

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[48]The plaintiffs' attempt to relegate *Seagram* to a "different era" of Commerce Clause adjudication is not persuasive. Nothing in *California Liquor Dealers v. Midcal*, 445 U.S. 97 (1980) implies that *Seagram* is no longer good law, or that the states' power under the twenty-first amendment is more restricted than it was fifteen years ago. The fact that the Court in *Midcal* began with an analysis of the Sherman Act issue, instead of the twenty-first amendment, is hardly a "telling indication of the shift in the Court's perspective on the accommodation of the Commerce Clause and the Twenty-first Amendment between 1966 when *Seagram* was decided and *Midcal* in 1980." USBA's Brief on Pre. Inj. at 25 n.l. There are any number of good reasons why the Court structured its opinions differently, the most obvious being the fact that they reached opposite conclusions. Whatever the reason for the organization of the opinion in *Midcal*, this court looks to the content of that opinion for guidance. And nothing the Court said in *Midcal* indicates that *Seagram* is no longer good law. *See* 445 U.S. at 106-10.

[49]The brewers argue that this case presents a factual record which was missing in *Seagram v. Hostetter*. This record consists of the affidavits of brewers and importers outlining their market practices and indicating the options they have and the effects of complying with the affirmation law. In addition, plaintiffs have submitted the affidavit of Dr. Owen, an antitrust expert, stating the likely effects of the statute on competition in

As indicated above, the price affirmation statute does not discriminate against any of these brewers. Nor does the fact that the Connecticut statute regulates beer and not liquor suffice to distinguish this case from *Seagram*, regardless of the differences in the products or the way they are marketed. The plaintiffs' attempt to distinguish the instant case on the basis of a forbidden purpose is, in light of the discussion in the preceding section, similarly unavailing. In short, nothing about the "facts"[50] in this case is sufficient to distinguish it from *Seagram v. Hostetter*.

This conclusion is buttressed by the Court's opinion in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). That case involved a Maryland statute which (1) prohibited producers or refiners of gasoline from operating retail service stations within the state and (2) required them to extend "voluntary allowances" (temporary price reductions) to all service stations. *See id.* at 119-20. The oil companies, as the brewers here, argued that the statute violated the Commerce Clause by discriminating against and unduly burdening interstate commerce. *Id.* at 125. The Court rejected the discriminiation claim because there were no local producers or refiners which benefited from the statute. *Id.* In response

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the beer industry. The court takes note, however, that the distillers in *Seagram* also submitted affidavits setting forth the difficulties in complying with the law and indicating the terrible consequences it would have on their marketing practices. *See generally* pp. 199-248 in the Supreme Court record. The only difference between this case and *Seagram*, then, is the affidavit of Dr. Owen. Without intimating any view as to the adequacy of Dr. Owen's analysis, the court does not believe his affidavit alone is sufficient to distinguish this case from *Seagram* on its *facts*.

[50]Of course, the brewers' contentions are not facts in the sense that they describe historical events. The brewers' affidavits only predict what will occur when the statute takes effect.

to the claim that the statute impermissibly burdened interstate commerce, the Court stated as follows:

> The crux of appellants' [Exxon's] claim is that, regardless of whether the State has interfered with the movement of goods in interstate commerce, it has interfered "with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 [(1976)]. . . . *We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market.* See *Breard v. Alexandria*, 341 U.S. 622 [(1951)]. As indicated by the Court in *Hughes*, the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.

*Exxon v. Maryland*, 437 U.S. 127-28 (Emphasis added).

The court views plaintiffs' claims in the instant case as essentially the same as those raised by the oil companies in *Exxon*. Plaintiffs argue that the statute will result in the "dislocating of the existing beer distribution system," and equate such dislocation with a "substantial adverse impact on commerce."[51] While the beer price affirmation statute may interfere with the "natural functioning of the interstate market" and force changes in the "particular structure or methods of operation" in the beer market, *Exxon v. Maryland* makes it clear that this alone does not constitute an impermissible burden on interstate commerce. *See id.* at 127. Even assuming that some of the brewers or importers withdraw from the Connecticut market, as they threaten to do, it does not follow

[51]USBA's Brief on Pre. Inj. at 39.

that the statute impermissibly burdens interstate commerce. As the Court indicated in *Exxon v. Maryland*, withdrawal from a particular market is not necessarily a burden on commerce.

> Some refiners may choose to withdraw entirely from the Maryland market, but there is no reason to assume that their share of the entire supply will not be promptly replaced by other interstate refiners. The source of the consumers' supply may switch from company-operated stations to independent dealers, but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.

*Id.* at 127

Similarly, in the instant case there is no reason to believe that the withdrawal of some brewers or importers from Connecticut will not be compensated by increased sales by other brewers or importers. Since all beer sold in the state travels in interstate commerce, withdrawal will simply shift business from one interstate supplier to another. This is clearly permissible under the holding in *Exxon v. Maryland*. The basic beer pricing decisions which underlie the brewers' competitive strategies is left to them, and each may strike the balance it chooses. I therefore hold that the beer price affirmation statute does not place an impermissible burden on the movement of beer in interstate commerce.[52]

b. Consumers

The brewers' second argument is that the price affirmation statute burdens interstate commerce by restricting the

[52]Because the statute does not burden interstate commerce in beer, it is unnecessary to employ the "balancing test" of *Pike v. Bruce Church, Inc.*, 397 U.S. at 142.

movement of consumers across state lines. Once again the brewers are invoking the rights of third parties. Here, however, the brewers and the consumers on whose behalf they argue have antagonistic interests. It thus becomes necessary to consider whether the brewers may assert claims relating to the constitutional rights of third parties.

Plaintiffs do not have standing to raise the consumers' claim that the statute burdens their freedom of movement in interstate commerce. As the Court observed in *Warth v. Seldin*, 422 U.S. 490 (1975), a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of third parties." *Id.* at 499. *See also Valley Forge Christian College v. Americans United for Separation of Church and State*, 50 U.S.L.W. 4103, 4106 (Jan. 12, 1982); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam). While the Court has allowed plaintiffs to assert the constitutional rights of third parties under "peculiar circumstances," this is not such a case. *See Barrows v. Jackson*, 346 U.S. 249, 256-57 (1953). Because plaintiffs' interests are antagonistic to those of the group whose rights they seek to assert, this case is particularly inappropriate for finding an exception to the prudential limitation on standing embodied in *Warth v. Seldin*.

Even assuming, however, that plaintiffs do have standing to assert the rights of consumers, the brewers' argument must be rejected. While it is true that the Commerce Clause protects persons from restraints on their movements across state lines, *Service Machine & Shipbuilding Corp. v. Edwards*, 617 F.2d 70, 73 (5th Cir.), *aff'd*, 449 U.S. 913 (1980), citing *Edwards v. California*, 314 U.S. 160, 172 (1941), not everything which affects the movment of persons is a burden on

interstate commerce. A burden is only that which imposes a restrictive or onerous load upon interstate commerce. The restriction must prevent or limit the exercise of the right to freedom of movement to rise to the level of a Commerce Clause violation. A statute which creates disincentives to travel across state lines by imposing costs on those who wish to do so, would also be characterized as a burden on interstate commerce. *See Service Mach. & Ship. v. Edwards*, 617 F.2d at 76.

The statute in the instant case does not prohibit or otherwise limit the movement of consumers across state lines. Any consumers who wish to continue driving to bordering states to purchase beer may do so. The statute may reduce the incentives for Connecticut consumers to drive out of state for purchases of beer, but it does not involuntarily restrict their movements. That consumers may, of their own free will, decide not to drive to bordering states to purchase beer can hardly be characterized as a burden on interstate commerce.

It is noteworthy that Connecticut consumers have not complained that the statute restricts their freedom of movement in interstate commerce. Nor are they likely to do so, since consumers are the ones who will benefit from lower beer prices in Connecticut. Far from imposing a burden on their movements, the statute relieves consumers of the burden of traveling to bordering states merely to purchase beer. While it may be that the price affirmation statute will reduce the flow of Connecticut consumers across state lines, it does not do so by imposing a burden on interstate commerce. The statute does not act by compulsion in limiting the flow of consumers in interstate commerce. At most it may encourage consumers to *voluntarily* restrict their out-of-state purchases of beer. Such a restriction, self-imposed by consumers acting

out of enlightened self-interest, is simply not a burden on interstate commerce.[53]

B. *The Sherman Act*

Plaintiffs' second contention, that the price affirmation statute violates the Supremacy Clause by mandating conduct violative of the Sherman Act, does not require extended discussion. This same argument was raised in *Seagram & Sons v. Hostetter*, 384 U.S. 35, and rejected by the Court. "Section 9 [the price affirmation provision] imposes no irresistible economic pressure on the appellants to violate the Sherman Act in order to comply with the requirements of §9." *Id.* at 45.

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[53]Even assuming *arguendo* that the statute does burden the movements of consumers in interstate commerce, it still would withstand the balancing test of *Pike v. Bruce Church, Inc.* The state's interest in reducing the price of beer is certainly a legitimate local interest. *Pharmaceutical Society of State of New York v. Lefkowitz*, 586 F.2d 953, 957 (2d Cir. 1978) (potential saving to New York consumers from lower priced generic drugs represents legitimate interest). Nor does it appear that Connecticut can achieve this result without having the same impact on the interstate movement of consumers. Anything which reduces the price differential between retail prices in Conecticut and those in the bordering states will reduce the incentives for out-of-state purchases of beer and thus tend to limit the flow of traffic across state lines. Thus, even if Connecticut adopted the plaintiffs' suggestion and repealed its restrictive regulations, this would not impose a lesser burden on interstate activity if beer prices declined as significantly as they may under affirmation. Since incidental burdens on interstate commerce will only invalidate state legislation where the burdens are "clearly excessive," *Pike v. Bruce Church, Inc.*, 397 U.S. at 142, any burdens which the statute imposes fall short of this standard. Thus even accepting the brewers' argument on its terms, the statute does not violate the Commerce Clause.

The brewers argue, however, that the New York statute in *Seagram* was significantly different from the Connecticut statute here, inasmuch as the former required only that posted prices for a given item be no higher than the lowest price at which such item was sold in the nation during the *previous* month. The Connecticut statute, on the other hand, requires that posted prices be the lowest at which the item will be sold in the *coming* month. Because it is geared to the future, the Connecticut statute effectively sets minimum prices for the four-state area once the price is posted in Connecticut on the thirteenth of the month. The New York law in *Seagram*, with its referent in the past, had no such effect. This difference, plaintiffs argue, is grounds for distinguishing *Seagram* and finding a Sherman Act violation.

The basic flaw in plaintiffs' argument was pointed out by the court in its ruling on the motion for preliminary injunction. "Absent an agreement among private parties, there cannot be a violation of section one of the Sherman Act, 15 U.S.C. §1." *United States Brewers Ass'n. v. Healy*, slip op. at 13. The plaintiffs argue that the court is in error, relying on *California Retail Liquor Dealers Association v. Midcal* Aluminum, Inc., 445 U.S. 97 (1980) for the proposition that no agreement is necessary to constitute a violation of section one. In *Midcal*, the Supreme Court struck down a California statute which required wine producers to fix minimum prices at which wholesalers could resell the wine. *Id.* at 103. The Court noted that the system "not only permitted vertical control of prices by producers, but also frequently resulted in horizontal price fixing." *Id.* at 101 & n.3. Relying on a long line of cases holding that resale price maintenance illegally restrains trade, *see Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407 (1911) and finding no immunity under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), the Court invalidated the California statute.

Plaintiffs err in their assertion that *Midcal* eliminated the requirement of an agreement for a violation of section one. The Court there indicated that resale price maintenance is the equivalent of an agreement between wholesalers not to compete, *id.* at 103, since the resale restrictions set the prices wholesalers charge retailers. Invariably, the Supreme Court has viewed resale price maintenance as involving an implicit agreement in those instance where an explicit agreement was not shown. In *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960) the Court "held that an illegal combination to fix prices results if a seller suggests resale prices and secures compliance by means in addition to the 'mere announcement of his policy and the simple refusal to deal. . . .' *Id.* at 44." *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968). The other cases cited by the Supreme Court in *Midcal* all involved actual contracts between manufacturers and wholesalers and/or retailers setting the resale prices. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 385 (1951) (distillers made retailers sign price fixing contracts); *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951) (Seagram refused to sell unless purchaser agreed to maximum resale price); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85, 95 (1920) defendant executed uniform contracts with tire manufacturers); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 20 U.S. 373, 394 (1911) (manufacturer adopted two forms of restrictive agreements).

That *Midcal* did not remove the requirement of an agreement can be seen in a close reading of the case itself. The statute there required "wine producers to enter into trade *contracts* with wholesalers, or establish binding resale price *schedules* for wholesalers." *Serlin Wine & Spirit Merchants, Inc. v. Healy*, 512 F. Supp. 936, 938 (D. Conn. 1981) (emphasis added). The Second Circuit Court of Appeals, in affirming *Serlin v. Healy*, indicated that *Midcal* did involve an agreement. In distinguishing the Connecticut statute there

under attack, the court stated. "[u]nlike the California statute in *Midcal*, the Connecticut statutes do not authorize or compel private parties to enter *contracts* or *combinations* to fix prices in violation of §1 of the Sherman Act." *Morgan v. Division of Liquor Control*, Docket Nos. 81-7354, 81-7364, slip op. 229, 233 (2d Cir. Nov. 16, 1981) (emphasis added). Because *Midcal* involved either an express or implied agreement, plaintiffs' argument must be rejected.

> It is clear then, that
>
> > [s]ection 1 of the Sherman Act, which proscribes every "contract, combination, or conspiracy" in restraint of trade, is directed only at joint action. Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874, 878 (1st Cir. 1966). It does not prohibit independent business actions and decisions. . . . Fundamental then to any §1 claim is the finding of an agreement, express or otherwise, between two or more persons.

*Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 108-09 (2d Cir. 1975). *See also Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1029 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979). It is also clear that the beer price affirmation statute requires only unilateral action by each brewer and importer. It does not require conduct which the antitrust laws forbid, and does not exert "irresistible economic pressure" on the plaintiffs to violate the Sherman Act. It follows that the statute does not implicate the Supremacy Clause, and, therefore, plaintiffs' argument must be rejected.[54]

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[54]Even assuming that the statute did violate the Sherman Act, it might be protected under the immunity doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). *See Serlin v. Healy*, 512 F. Supp. 936, 942 (D. Conn. 1981), *aff'd sub. nom. Morgan v. Div. of Liquor Control*, slip op. at 234 (2d Cir. Nov. 16, 1981).

C. *Due Process*

Plaintiffs claim that the price affirmation statute violates the Due Process Clause in two respects. First, that it constitutes a "taking" of property without just compensation, and second, that it regulates the beer business in the bordering states, thus exceeding the jurisdictional limitations on state authority.[55] These arguments need not detain us long.

As the court stated in its previous ruling in this case,

> the statute cannot reasonably be characterized as a "taking" of property without due process, because it does not force any brewers to do business in Connecticut at a loss. The mere fact that the plaintiffs' business in Connecticut may decline in value due to the price affirmation statute does not constitute a "taking" of property without just compensation. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 [131] (1978). And even if some brewers choose to cease doing business in Connecticut, that too would not constitute a taking of property. [*See Exxon v. Maryland*, 437 U.S. 117, 127 (1978)].

*United States Brewers Ass'n v. Healy*, slip op. at 13-14 n.18.

Plaintiffs' second Due Process argument is equally without merit. As the Court stated in *Seagram v. Hostetter*,

> "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Osborn v. Ozlin*, 310 U.S. 53, 62 [(1940)].

*Id.* at 43.

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[55]USBA's Brief on Pre. Inj. at 51-52.

This quotation, and the holding in *Seagram* itself, leaves no doubt that Connecticut's statute does not violate the Due Process Clause.[56]

D. *Twenty-first Amendment*

Plaintiffs' last argument is that the price affirmation statute impermissibly infringes on the twenty-first amendment powers of the bordering states.[57] The short response to this claim is twofold. "First plaintiff[s] ha[ve] no standing to litigate the claims of other states. *Warth v. Seldin*, 422 U.S. 490, 499 (1975)." *United States Brewers Ass'n v. Healy*, slip op. at 13 n.18. Second, even if plaintiffs did have standing, the claim is without merit, having been resolved by the Court in *Seagram*. It stated:

> As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country.

*Id.* at 43.

Since the Connecticut statute does no more than insist that beer prices to its wholesalers be as low as prices offered

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[56]Plaintiffs' citation to *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426 (1926) is inapposite. There New Mexico imposed sanctions for conduct which occurred *outside* the state. *Id.* at 433-35. The Connecticut statute, in contrast, does not regulate conduct in another state, since it is the affirmation *in* Connecticut which is the focus of the statute. These cases are thus easily distinguishable.

[57]USBA's Brief on Pre. Inj. at 53-54.

to wholesalers in the bordering states, it clearly fits within the constitutionally permissible domain outlined in *Seagram*. Accordingly, plaintiffs' twenty-first amendment claim must also be rejected.

E. *Conclusion*

In conclusion, Connecticut's beer price affirmation statute does not violate the Commerce Clause since it neither discriminates against interstate commerce nor imposes an impermissible burden upon such commerce. Nor does the statute compel a violation of section one of the Sherman Act, since it requires only unilateral conduct by the brewers and importers.

Accordingly, plaintiffs' motion for summary judgment is denied, and defendants' cross-motion for summary judgment is granted.

SO ORDERED.

Dated at Hartford, Connecticut, this 16th day of February, 1982.

M. JOSEPH BLUMENFELD
Senior United States District Judge

## Appendix B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| UNITED STATES BREWERS ASSOCIATION, INC., as an association, and on behalf of its members selling beer in the State of Connecticut and the bordering States of Massachusetts, New York and Rhode Island: | : | |
| ANHEUSER-BUSCH, INC., CHRISTIAN SCHMIDT BREWING COMPANY, G. HEILEMAN BREWING COMPANY, INC., LATROBE BREWING COMPANY, PABST BREWING COMPANY, THE F & M SCHAEFER BREWING COMPANY and JOSEPH SCHLITZ BREWING CO. | : | |
| ANHEUSER-BUSCH, INC.; CHAMPALE, INC.; MILLER BREWING COMPANY; CENTURY IMPORTERS, INC.; GUINNESS-HARP CORPORATION; KRONENBOURG USA, INC.; MARTLET VAN MUNCHING AND CO., INC. | : | |
| *v.* | : | CIVIL ACTION NO. H81-836 |
| JOHN F. HEALY, DAVID L. SNYDER and LOUIS A. SIDOLI, as Commissioners of the Department of Liquor Control; and CHARLES W. KASMER, as Secretary of the Department of Liquor Control | : | |

## JUDGMENT

This action having come on for consideration of Cross-Motions for Summary Judgment before the Honorable M. Joseph Blumenfeld, Senior United States District Judge; and,

The Court having considered the Motions and all papers filed in support of and in opposition to the Motions, and the Court having filed its Ruling on Cross-Motions for Summary Judgment on February 16, 1982, denying the Plaintiffs' Motion for Summary Judgment and granting the Defendants' Motion for Summary Judgment,

It is accordingly ORDERED, ADJUDGED and DECREED that Judgment be and is hereby entered in favor of the Defendants, dismissing the Plaintiffs' Complaint.

Dated at Hartford, Connecticut, this 24th day of February, 1982.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: JOHN K. HENDERSON, JR.
Deputy-in-Charge

## Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 994—August Term, 1981

(Argued May 19, 1982 Decided November 1, 1982)

Docket No. 82-7158

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,

*Plaintiffs-Appellants,*

*v.*

JOHN F. HEALY, *et al.*,

*Defendants-Appellees.*

Before:

TIMBERS, VAN GRAAFEILAND, and KEARSE,

*Circuit Judges.*

Appeal from a judgment of the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *Judge*, 532 F. Supp. 1312 (1982), dismissing complaint challenging constitutionality of beer price affirmation provisions

of the Connecticut Liquor Control Act, Conn. Gen. Stat. Ann. §§30-1 to 30-113 (West 1975 & Supp. 1982).

Reversed.

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WILLIAM H. ALLEN, Washington, D.C. (H. Thomas Austern, Richard A. Friedman, Sarah E. Burns, Covington & Burling, Washington, D.C., Winthrop J. Allegaert, Thomas J. Sheridan, III, Richards, O'Neil & Allegaert, New York, New York, on the brief), *for Plaintiffs-Appellants United States Brewers Association, et al.*

WILLIAM HUGHES MULLIGAN, New York, New York (John D. Feerick, Jeffrey Glekel, Charles M. Yablon, Timothy G. Reynolds, Skadden, Arps, Slate, Meagher & Flom, New York, New York, Day, Berry & Howard, Hartford, Connecticut, of counsel), *for Plaintiff-Appellant Anheuser-Busch, Inc.*

JOHN R. LACEY, Assistant Attorney General, Hartford, Connecticut, RICHARD M. SHERIDAN, Assistant Attorney General, Newington, Connecticut (Carl R. Ajello, Attorney General of the State of Connecticut, Robert M. Langer, Assistant Attorney General, Hartford, Connecticut, Robert F. Vacchelli, Assistant Attorney General, Newington, Connecticut), *for Defendants-Appellees John F. Healy, et al.*

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KEARSE, *Circuit Judge:*

Plaintiffs United States Brewers Association, a non-profit corporation representing brewers and importers of beer, and individual companies that are brewers or importers of beer, appeal from a final judgment of the United States District

Court for the District of Connecticut, M. Blumenfeld, *Judge*, dismissing their complaint against defendants John F. Healy, *et al.*, officials of the Connecticut Liquor Control Department, seeking declaratory and injunctive relief to prohibit the enforcement of §§30-63a(b), 30-63b(b), and 30-63c(b) (the "beer price affirmation" provisions or "Connecticut statute") of the Connecticut Liquor Control Act, Conn. Gen. Stat. Ann. §§30-1 to 30-113 (West 1975 & Supp. 1982). Plaintiffs contended principally that the beer price affirmation provisions violate the Supremacy Clause of the Constitution, art. VI, cl. 2, by requiring them to violate §1 of the Sherman Act, 15 U.S.C. §1 (1976), and place an impermissible burden on interstate commerce in violation of the Commerce Clause of the Constitution, art I, §8, cl. 3. In an opinion reported at 532 F. Supp. 1312 (1982), the district court granted summary judgment in favor of defendants. Since we conclude that the Connecticut statute places an unconstitutional burden on interstate commerce, we reverse.

## I. Facts

The Connecticut Liquor Control Act is a comprehensive statute regulating the sale and distribution of liquor in Connecticut. Historically the retail price of beer has been generally higher in Connecticut than in its neighboring states, *i.e.*, Massachuests, New York, and Rhode Island. As a consequence Connecticut residents have crossed state borders in significant numbers to purchase beer in other states at lower retail prices. In 1981, the Connecticut legislature amended the Liquor Control Act, effective January 1, 1982, by enacting the beer price affirmation provisions challenged here. The district court found it undisputed that the purpose of these provisions was to lower the retail price of beer in Connecticut, thereby increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state. 532 F. Supp. at 1316-17.

Several provisions were adopted to achieve these goals. Conn. Gen. Stat. §30-63(c) provides, as it did before the 1981 amendments, that each manufacturer or importer of beer (collectively "brewers")[1] must file a schedule stating the per-unit[2] price that it will charge Connecticut wholesalers for its products in the following month.[3] These "posted prices" must be filed on the thirteenth day of the prior month, Conn. Dep't of Liquor Regs. §30-6-B4; and §30-63(c) as amended in 1981 provides that the posted prices may not be

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[1]The statute, *see* notes 3, 5, 6, and 7 *infra*, refers to "manufacturers" and "out-of-state shipper" permittees. There are no breweries in Connecticut, and the beer price affirmation provisions hence impose requirements only on out-of-state companies.

[2]Prices are to be posted per bottle, per can, and per case for every size container. We use the term "per unit" to encompass all of these.

[3]Section 30-60(c) (West Supp. 1982) provides, in pertinent part, as follows:

> Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department the bottle, can and case price of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. . . . A manufacturer or wholesaler may amend his posted price for any month to meet a lower price posted by another manufacturer or wholesaler with respect to alcoholic liquor bearing the same brand or trade name and of like age, vintage, quality and unit container size; provided that any such amended price posting shall be filed before three o'clock P.M. of the fourth business day after the last day for posting prices; and provided further such amended posting shall not set forth prices lower than those being met.

The portion of the section preceding the ellipsis was part of the Liquor Control Act prior to the 1981 amendments; the portion following the ellipsis was added in 1981.

changed, except that within the four-day period following the posting deadline a brewer may lower his posted price to meet, but not to beat, the lower posted price of another brewer with respect to a beer of like grade and quality. A brewer is not permitted to deviate from its posted prices in selling to Connecticut wholesalers during the one-month period to which the posting applies. *Id.*

Conn. Gen. Stat. §30-63b(b) was added to require that when the brewer posts its prices pursuant to §30-63(c), it must also file a sworn affirmation that its posted per-unit prices will be no higher than its prices for the corresponding units sold[4] in any state bordering Connecticut during the month covered by the posting.[5] In the same vein, §30-63a(b) was added to prohibit a brewer from selling beer to a Connecticut wholesaler at a unit price higher than the lowest price charged for that unit by the brewer in any state bordering Connecticut.[6]

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[4]The statute, *see, e.g.*, note 5 *infra*, refers to shipment, transport, delivery, sale, etc. For convenience we use the term "sale" to encompass all of these.

[5]Section 30-63b(b) (West Supp. 1982) provides as follows:

> At the time of posting of the bottle, can and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that the bottle, can or case price to the wholesaler permittees during the period of the posting will be no higher than the lowest price at which each such item of beer is or will be sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state, at any time during the calendar month covered by such posting.

[6]Section 30-63a(b) (West Supp. 1982) provides as follows:

> No holder of any manufacturer or out-of-state shipper's

Finally, new §30-63c(b) provides that a brewer's "lowest" price to a wholesaler in a neighboring state is to be determined by taking into account adjustments for rebates, discounts, allowances, and other inducements of any kind offered to the out-of-state wholesaler; and it requires each brewer to offer to Connecticut wholesalers all of the same sizes of its brand that are offered in the bordering states.[7] For a

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permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

[7]Section 30-63c(b) (West Supp. 1982) provides as follows:

In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floorstock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits or each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes, approved by the department of liquor control, of his brand which he offers to any wholesaler in any state bordering this state.

violation of these provisions a brewer may have its permit to do business in Connecticut revoked or suspended, Conn. Gen. Stat. Ann. §30-57 (West Supp. 1982), or may be fined $1,000 and/or imprisoned for up to one year, Conn. Gen Stat. Ann. §30-113 (West Supp. 1982).

Plaintiffs commenced the present action seeking declaratory and injunctive relief prohibiting the enforcement against them of the beer price affirmation provisions, contending that the Connecticut statute is unconstitutional in two principal respects.[8] First, plaintiffs argued that the beer price affirmation provisions require industry-wide conduct tantamount to the fixing of minimum prices, which would violate §1 of the Sherman Act, 15 U.S.C. §1, if undertaken voluntarily by private parties. They contended that the Connecticut provisions are thus preempted by the Sherman Act, and that the enforcement of the state provisions would violate the Supremacy Clause of the Constitution. Second, plaintiffs contended that the Connecticut statute is protectionist legislation that impermissibly burdens interstate commerce and discriminates against out-of-state businesses in violation of the Commerce Clause. Defendants, on the other hand, contended that the Twenty-first Amendment to the Constitution gives the state carte blanche to regulate the prices at which plainiffs may sell beer in Connecticut and that, accordingly, plaintiffs' claims must fail. Both sides moved for summary judgment.

The district court granted defendants' motion and dismissed the complaint. The court held that the beer price affirmation statute does not violate the Supremacy Clause because it does not require brewers to enter into a contract, combination, or conspiracy in violation of the Sherman Act.

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[8]The action was commenced prior to the effective date of the amendments and plaintiffs unsuccessfully sought a preliminary injunction against enforcement.

532 F. Supp. at 1328-30. The court rejected plaintiffs' Commerce Clause claims on the grounds that the legislation is not impermissibly protectionist or discriminatory in intent because it attempts only to equalize, not to favor, the competitive position of Connecticut dealers, *id.* at 1323; that the statute has no discriminatory effect because out-of-state wholesalers have "no right, constitutional or otherwise, to receive lower prices from the brewers," *id.* at 1324; and, relying on *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966), that the statute does not place an undue burden on commerce, 532 F. Supp. at 1324-27.

On appeal, plaintiffs pursue their Supremacy Clause and Commerce Clause claims.[9] For the reasons below, we conclude that the Connecticut statute is permitted by neither the Commerce Clause nor the Twenty-first Amendment, and we reverse the judgment on that ground without reaching plaintiffs' Supremacy Clause contentions.

## II. Discussion

The Commerce Clause of the Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . ." U.S. Const. art. I, §8, cl. 3. This grant of authority to Congress has long been construed to place implicit limitations on actions affecting interstate commerce that may be taken by individual states. *See, e.g., Cooley v. Board of Wardens*, 53 U.S. (12 How.) 298 (1851); *The Passenger Cases*, 48 U.S. (7 How.) 282 (1849). In general the Commerce Clause is

[9]In the district court plaintiffs contended also that the Connecticut statute violated their rights to substantive due process and infringed on the powers of Massachusetts, New York, and Rhode Island under the Twenty-first Amendment to regulate the sale of beer within their respective borders. Plaintiffs do not pursue these arguments on appeal.

viewed as intending to promote free trade among the states and to liberate the flow of articles in commerce from the provincialism evident in many local regulations. *See, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

A. *General Commerce Clause Principles*

With these goals in mind several general precepts regarding the Commerce Clause have been formulated. State regulation that is designed to confer economic benefits on the businesses and residents of the state, and to do so at the expense of businesses and residents of other states, is generally impermissible. *See, e.g., Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 350-53 (1977). Such discriminatory regulation constitutes "simple economic protectionism," which is "virtually *per se*" unconstitutional. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (state prohibition of use of local landfills for garbage of out-of-state origin violates Commerce Clause).

If, on the other hand, the state regulation does not seek to distinguish between articles of commerce on the basis of their domestic or out-of-state origins, and the effects on interstate commerce are only incidental, the regulation will be found to burden commerce impermissibly only if, on balance, the benefits sought by the regulating state outweigh the detriments to interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36-37 (1980); *Hughes v. Oklahoma*, 441 U.S. 322, 331 (1979). In *Pike v. Bruce Church*, the Supreme Court stated this principle as follows:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly

> excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142 (citation omitted). Where the local interest involved could plainly have been promoted with a lesser impact on interstate activities, the state regulation has been held to violate the Commerce Clause. *E.g., Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (where local inspections could serve purpose of ensuring that local health standards were met, statute permitting sale of out-of-state milk in Mississippi only if the state of origin allowed sale therein of Mississippi milk on a reciprocal basis impermissibly burdened commerce).

If the purpose or effect of a state's law is to regulate conduct occurring wholly outside the state, the burden on commerce is generally held impermissible, and the fact that the law may not have been intended as protectionist or discriminatory will not save it. In *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925), the Court stated that "a state statute which by its necessary operation directly interferes with or burdens such commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted." Thus, it has been held repeatedly that where the practical effect of a state's legislation is to control conduct in *other* states, the regulation violates the Commerce Clause. *E.g., New York, Lake Erie & Western Railroad v. Pennsylvania*, 153 U.S. 628, 646 (1894) (state may not constitutionally regulate payments made by railroad in another state); *Shafer v. Farmers Grain Co., supra*, 268 U.S. at 201 (regulation of

in-state purchases with a view to preventing "unreasonable margins of profit" on out-of-state resales violates Commerce Clause); *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426, 435 (1926) (state may not prevent corporation from employing and paying out-of-state agents needed for its in-state business); *Baldwin v. G.A.F. Seelig, Inc., supra*, 294 U.S. 524, 528 (interstate commerce unduly burdened by state law forbidding in-state resale of milk purchased from out-of-state farmers at prices below the minimum prices required to be paid to in-state farmers); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945) (state may not regulate length of trains within its territory where "practical effect . . . is to control train operations beyond [its] boundaries . . . because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state"); *see also Edgar v. Mite Corp.*, 102 S.Ct. 2629, 2641 (1982) (opinion of White, J.) ("Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within the state").

In *Edgar v. Mite Corp.*, the Supreme Court dealt with an Illinois statute that regulated tender offers for corporations at least 10% of whose securities subject to the offer were owned by shareholders located in Illinois. The Court observed that the statute would interfere with the rights of non-Illinois shareholders to sell their shares to a non-Illinois buyer in a transaction outside of Illinois, and concluded that even applying the balancing test set forth in *Pike v. Bruce Church, Inc., supra*, the extraterritorial effect of the statute far outweighed its in-state benefits:

> The most obvious burden the Illinois Act imposes on interstate commerce arises from the statute's previously-

described nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere.

. . . .

While protecting local investors is plainly a legitimate state objective, the state has no legitimate interest in protecting non-resident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law.

*Id.* at 2641-42.[10]

B. *Principles Governing Commerce in Alcoholic Beverages*

To an extent, the limitations placed by the Commerce Clause upon the powers of individual states to regulate commerce have been altered with respect to alcoholic beverages by the Twenty-first Amendment to the Constitution. Section 2 of that Amendment provides as follows:

The transportation or importation into any State, Territory, or possession of the United States for delivery

[10] *See also id.* at 2641 (opinion of White, J.):

The limits on a state's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer v. Heitner*, 433 U.S. 186, 197, 97 S. Ct. 2569, 2576, 53 L.Ed.2d 683 (1977).

Because the Illinois Act purports to regulate directly and to interdict interstate commence, including commerce wholly outside the state, it must be held invalid as were the laws at issue in *Shaffer* and [*Southern Pacific Co. v. Arizona, supra*].

> or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The Twenty-first Amendment thus gives the states broad power to ban, restrict, or otherwise regulate importation and in-state traffic in alcoholic beverages, and thereby eliminates some of the otherwise applicable Commerce Clause constraints. *See Joseph E. Seagram & Sons v. Hostetter, supra,* 384 U.S. at 42. For example, a state may prohibit entirely the sale of intoxicating liquors within its borders, *see State Board of Equalization v. Young's Market Co.,* 299 U.S. 59, 62-63 (1936), although under traditional Commerce Clause limitations it could not ban the sale of other products, *see e.g., Baldwin v. G.A.F. Seelig, Inc., supra,* 294 U.S. 521 (wholesome milk); *Railroad Co. v. Husen,* 95 U.S. 465 (1877) (healthy cattle). Or a state may prohibit local dealers from selling beer manufactured in another state on the ground that the latter state discriminates against beer manufactured in the first state, *see Indianapolis Brewing Co. v. Liquor Control Commission,* 305 U.S. 391 (1939), although it would not be free to impose the same type of restrictions with respect to milk, *see Great Atlantic & Pacific Tea Co. v. Cottrell, supra*; nor could it constitutionally prohibit the exportation of local ground water to another state on the basis that the latter state would forbid exportation of its water to the first state, *see Sporhase v. Nebraska,* 102 S.Ct. 3456 (1982).

Notwithstanding the greater scope permitted to the states for regulation of traffic in intoxicating beverages, nothing in the Twenty-first Amendment suggests that a state may regulate the sale of liquor outside of its own territory. The Amendment itself speaks only of the "transportation or importation *into* any State . . . for delivery or use *therein*." (Emphasis added.) Nor do the cases interpreting the Amendment indicate that the Amendment, any more than the Commerce Clause, allows a state to regulate liquor traffic outside

its territory. Thus, the Supreme Court has noted that "the second section of the Twenty-first Amendment has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor," *Joseph E. Seagram & Sons v. Hostetter, supra*, 384 U.S. at 42, and has indicated that the traditional Commerce Clause strictures are inapplicable only " 'when [the state] restricts the importation of intoxicants destined for use, distribution, or consumption *within its borders,*' " *id.* (Emphasis added) (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964)). Accordingly, the Court has held it impermissible for a state to prevent shipment into and through its territory of liquor destined for distribution and consumption in a national park, an area not within the state's governance, *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938), or of liquor destined for ultimate delivery and use in a foreign country, *Hostetter v. Idlewild Bon Voyage Liquor Corp., supra.* We are aware of no authority to the effect that the Twenty-first Amendment modifies the traditional Commerce Clause principles that bar a state from regulating the transport, sale, or use of products outside of its own territory.

C. *Applicability of Commerce Clause and Twenty-first Amendment Principles to Connecticut's Beer Price Affirmation Provisions*

Plaintiffs have launched an all-out attack on the Connecticut beer price affirmation provisions under the Commerce Clause, contending, *inter alia*, that the statute was enacted with a discriminatory purpose,[11] that it will have a discrimi-

[11]Plaintiffs argue that the purpose of the statute was to protect local wholesalers and retailers from competition with out-of-state wholesalers and retailers. (*See* Anheuser-Busch brief on appeal at 8.) The district court found this contention unsupported by the record. 532 F. Supp. at 1318 n.16, 1323.

natory effect,[12] that it burdens interstate commerce by restricting the movement of consumers across state lines,[13] and that the law is ill-suited to achieve Connecticut's goals.[14] We

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[12]The district court rejected the contention that the legislation had a discriminatory effect, stating as follows:

> Plaintiffs argue that regardless of its purpose the statute has a discriminatory *effect* on out-of-state *wholesalers* and *retailers*. It is significant that the brewers here are attempting to invalidate the statute not because of its direct effects on them, but because of its indirect effects on third parties. They do not argue that the statute discriminates against out-of-state brewers or importers for the simple reason that there are no Connecticut brewers or importers. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125, 98 S.Ct. 2207, 2213, 57 L.Ed.2d 91 (1978).
>
> The brewers assert that the statute discriminates against out-of-state wholesalers and retailers. It is difficult, however, to conceive of the nature of the alleged discrimination. The statute does not affect any business out-of-state wholesalers or retailers conduct *in* Connecticut, since they are not permitted by law to sell beer within the state. Nor does the statute affect any rights to which out-of-state wholesalers or retailers are entitled. The brewers' argument, based on *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351-52, 97 S.Ct. 2434, 2445-2446, 53 L.Ed.2d 383 (1977), that the statute strips out-of-state retailers of a competitive advantage—lower prices—misses the point. Out-of-state wholesalers and retailers are not entitled to receive prices lower than those charged to their Connecticut counterparts. The out-of-state wholesalers and retailers have not, and could not complain that the statute takes from them the advantage of lower prices, when they have no right to those prices in the first place. If Connecticut may constitutionally regulate the prices brewers charge to their wholesalers, then it would seem to follow that the brewers may not complain about the incidental effects on their out-of-state customers when those effects do not implicate constitutional rights. Since it is clear that out-of-state wholesalers and retailers have no right, constitutional or otherwise, to receive lower

need reach none of these contentions, however, in order to find the beer price affirmation provisions on their face an impermissible burden on commerce, for it is evident that the Connecticut statute seeks to regulate prices not just in Connecticut but in its surrounding states as well.

Section 30-63(c), which requires the posting of prices to charged to Connecticut wholesalers for the coming month,

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beer prices from the brewers, there is nothing about which the brewers may complain. I therefore hold that the beer price affirmation statute does not discriminate against out-of-state businesses and does not, in this respect, contravene the Commerce Clause.

532 F. Supp. at 1324 (footnote omitted; emphasis in original).

[13]The district court rejected this argument on the ground, among others, that

> [t]he statute may reduce the incentives for Connecticut consumers to drive out of state for purchases of beer, but it does not involuntarily restrict their movements. That consumers may, of their own free will, decide not to drive to bordering states to purchase beer can hardly be characterized as a burden on interstate commerce.

532 F. Supp. at 1328.

[14]Plaintiffs argue that the Connecticut statute is unlikely to have the desired effects of increasing tax revenues (United States Brewers Association reply brief on appeal at 5) and of reducing prices to consumers: "[n]othing in the new law or any other Connecticut law is designed to ensure that, if prices to Connecticut wholesalers are reduced as a result of beer price affirmation (by no means a certainty), the reduction will be passed along to retailers and ultimately to Connecticut consumers." (United States Brewers Association brief on appeal at 45.) The district court found it unnecessary to reach these issues because it found the law did not burden commerce. 532 F.2d at 1327 n.52. In any event we consider that these issues, like several others raised by plaintiffs, do not appear to be particularly appropriate for resolution in plaintiff's favor by summary judgment.

is not itself in issue, for, standing alone, it has no extraterritorial effect. But the extraterritorial thrust of the main beer price affirmation provisions, §§30-63a(b) and 30-63b(b), *see* notes 6 and 5 *supra*, is plain, for those sections prevent a brewer from selling below the Connecticut wholesaler price to any wholesaler in any neighboring state. In other words, these sections tell a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, it may not do so at a price lower than that it has previously announced it will charge to Connecticut wholesalers. As the district court succinctly described it,

> [b]ecause it is geared to the future, the Connecticut statute effectively sets minimum prices for the four-state area once the price is posted in Connecticut on the thirteenth of the month.

532 F. Supp. at 1329.[15]

Thus, the obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut. Nothing in the Twenty-first Amendment permits Connecticut to set the minimum prices for the sale of beer in any other state, and well-established Commerce Clause principles prohibit the state from controlling the prices set for sales occurring wholly outside its territory.

Defendants' reliance on *Joseph E. Seagram & Sons v. Hostetter*, *supra*, as sanctioning Connecticut's beer price affirmation provisions, is misplaced. In *Seagram*, the Court

[15]The district court discussed this extraterritorial thrust of the Connecticut statute only in its analysis of plaintiffs' Supremacy Clause claims and does not appear to have focused on this aspect of the law in analyzing the effect on commerce.

considered a New York law that required liquor manufacturers to post monthly price schedules for sales of liquor in New York, with "an affirmation that 'the bottle and case price of liquor . . . is no higher than the lowest price' at which sales were made anywhere in the United States during the *preceding month.*" 384 U.S. at 39-40 (Emphasis added). The New York statute differed significantly from the Connecticut statute, because, unlike Connecticut's beer price affirmation provisions which control brewers' future conduct in the states surrounding Connecticut, the New York law in *Seagram* merely required that New York prices reflect what had been charged elsewhere in the past. Thus, the New York law, although it affected the prices that manufacturers would choose to set in other states, did not limit the freedom of a manufacturer at any given time to raise or lower prices in any other state.

In ruling that the New York statute in *Seagram* did not violate the Commerce Clause, the Court stated as follows:

> We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. *See Baldwin v. G.A.F. Seelig*, 294 U.S. 511. No such situation is presented in this case. The mere fact that §9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country.

*Id.* at 42-43 ( footnote omitted). The Court had taken care to note that this New York law, unlike that invalidated in

*Hostetter v. Idlewild Bon Voyage Liquor Corp., supra*, concerned liquor destined for use or distribution only "in the State of New York." *Id.* at 42.

We thus find in *Seagram* no indication that a state is permitted to control the prices at which liquor may be sold in other states, and we believe the *Seagram* Court's recognition that the New York statute regulated prices only within New York is highlighted by the Court's repeated references to *Baldwin v. G.A.F. Seelig, Inc.* The *Seagram* Court first cited *Seelig* in stating that there was no need in *Seagram* to decide whether the mode of liquor regulation within a state could "constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause," 384 U.S. at 42-43. In *Seelig*, the Court had held unconstitutional a New York statute that forbade the sale of Vermont-produced milk in New York unless the price paid to Vermont farmers was as high as the minimum price New York law required to be paid to New York farmers. Analysis in *Seelig* had commenced with the recognition that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." 294 U.S. at 521. The *Seagram* Court's second citation to *Seelig* followed its observation that " '[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids.' " *Id.* at 43 (quoting *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940)). The Court then cited *Seelig* and other cases, presumably to indicate what actions may be "within that domain which the Constitution forbids," and the page of the *Seelig* opinion to which the *Seagram* Court referred contains the statement that "[i]t is a very different thing to establish a . . . scale of prices for use in other states. . . ." 294 U.S. at 528.

Given the latitude allowed a state under the Twenty-first Amendment to regulate the sale of liquor within its own

borders, the holding in *Seagram* might well validate beer price regulation less intrusive than the present Connecticut statute, such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states, *see* 384 U.S. at 43-45, leaving those out-of-state prices unregulated by Connecticut. But nothing in *Seagram* purports to rule that a state may achieve its goal of price-parity by the far more drastic, and clearly excessive, method of controlling the minimum prices at which liquor may be sold outside of its own territory. We conclude that "[i]nsofar as the [Connecticut] statute burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." *Edgar v. Mite Corp., supra.*

## Conclusion

The judgment is reversed and the case is remanded to the district court for entry of judgment, in accordance with this opinion, in favor of plaintiffs.

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## Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| UNITED STATES BREWERS ASSOCIATION, INC., *et al* | : | |
| | : | |
| *v.* | : | CIVIL No. H-81-836 |
| | : | |
| JOHN F. HEALY, *et al* | : | |

### ORDER OF SUMMARY JUDGMENT

The Court of Appeals has held that the Connecticut statute, Conn. Gen. Stat. §§30-63a(b), 30-63b(b), 30-63c(b) (West 1975 & Supp. 1982), is an unconstitutional burden on interstate commerce because it regulates prices outside the State of Connecticut rather than those inside the State. Slip op. at 5479, 5493-94. The Court of Appeals explained that although a statute which required "simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states" might be constitutional under *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 43-45 (1966), Connecticut's statute, which "achieve[s] . . . price-parity by the far more drastic, and clearly excessive, method of controlling the minimum prices at which liquor may be sold outside of its own territory," is unconstitutional under *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935). Slip op. at 5496.

Accordingly, summary judgment is entered for plaintiffs.

SO ORDERED.

Dated at Hartford, Connecticut, this 13th day of

M. JOSEPH BLUMENFELD
Senior United States District Judge

## Appendix E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

| | | |
|---|---|---|
| UNITED STATES BREWERS ASSOCIATION, INC., *et al* *Plaintiffs* | : | |
| *v.* | : | DOCKET No. 82-7158 |
| JOHN F. HEALY, *et al* *Defendants* | : | |

**AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that John F. Healy, David L. Snyder and Louis A. Sidoli, as Commissioners of The Department of Liquor Control and Charles W. Kasmer, as Secretary of the Department of Liquor Control, the Defendants above named, hereby appeal to the Supreme Court of the United States from the final order reversing the District Court entered in this action on November 1, 1982.

This appeal is taken pursuant to 28 U.S.C. Sec. 1254(2).

Dated at Newington, Connecticut, this 19th day of November, 1982.

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(A member of the Bar of the U.S. Supreme Court)

Filed: Nov. 22, 1982

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**PROOF OF SERVICE**

This is to certify that the undersigned served one copy of the Amended Notice of Appeal upon each other party separately represented by depositing same this date at the U.S. Post Office in Hartford, Connecticut, with first-class postage prepaid this 19th day of November, 1982, addressed to counsel of record as follows:

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## Appendix F

## SUPREME COURT OF THE UNITED STATES

No. A-608

JOHN F. HEALY, *et al.*

*Appellants*

*v.*

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*

## ORDER

UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including March 10, 1983.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme
Court of the United States

Dated this 18th
day of February, 1983.

No. 82-1493

IN THE

# United States Supreme Court

OCTOBER TERM, 1982

JOHN F. HEALY, *et al.*,
*Appellants,*

v.

UNITED STATES BREWERS ASSOCIATION, INC. *et al.*,
*Appellees.*

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

## MOTION FOR SUMMARY AFFIRMANCE

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*Association, Inc.,*
*and others*

June 29, 1983

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# United States Supreme Court

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**No. 82-1493**

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JOHN F. HEALY, *et al.*,
*Appellants,*

v.

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,
*Appellees.*[1]

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ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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## MOTION FOR SUMMARY AFFIRMANCE

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Appellees, the United States Brewers Association, Inc., and others, and Anheuser-Busch, Inc., respectfully move this Court for an order summarily affirming the judgment of the United States Court of Appeals for the Second Circuit in this action. The court of appeals held that Sections 30-63a(b), 30-63b(b) and 30-63c(b) of the Connecticut Liquor Control Act (the "price affirmation provisions")[2] constituted impermissible regu-

[1] The Appendix to this motion contains the list required by Supreme Court Rule 28.1 of the appellees and their parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates.

[2] The Connecticut beer price affirmation provisions and price posting statute, Conn. Liquor Control Act § 30-63, are set out in their entirety at pages 3 through 7 of the jurisdictional statement.

lation by the State of Connecticut of the price of beer in the adjoining states of New York, Massachusetts and Rhode Island and thus were invalid under the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3.

Summary affirmance is requested because the decision below is manifestly correct. The court of appeals simply measured the Connecticut statute against the Commerce Clause standard of this Court's recent decision in *Edgar v. Mite Corp.*, 102 S. Ct. 2629 (1982), and earlier precedents and found it wanting. There is no doubt under those decisions that, where one state seeks by statute to control, and indeed set, minimum prices at which goods are sold in other states, that statute is necessarily invalid as an impermissible interference with the freedom of trade and commerce between the states that the Commerce Clause guarantees. The issues that Connecticut raises in questioning that proposition are so insubstantial as not to require full briefing and argument for their disposition.

## STATEMENT

The price affirmation provisions were enacted by the Connecticut Legislature in 1981 as additions to extensive regulatory provisions that already governed the beer trade in Connecticut. Under those prior provisions, every brewer must post on the thirteenth of each month the prices at which it will sell its brand or brands of beer, in various kinds of containers, to wholesalers within Connecticut during the succeeding month. Once posted, those prices cannot be changed during the period of the posting. Conn. Liquor Control Act § 30-63 (Jur. St. 5-7).

Under the new price affirmation provisions, at the time of the required posting the brewer must also file a written affirmation under oath that the posted price for a brand and container of beer will not exceed the lowest price for the same brand and container charged to a wholesaler in any state adjoining Connecticut. Conn. Liquor Control Act § 30-63b(b) (Jur. St. 4-5). Section 30-63a(b) (Jur. St. 3) confirms the affirmation requirement by prohibiting the sale of a brand or

container of beer to a Connecticut wholesaler at a price higher than the lowest price in any of the three states adjoining Connecticut—Massachusetts, New York and Rhode Island.

On the complaint of these appellees—who are most of the brewers and importers of beer selling to Connecticut wholesalers—the district court granted summary judgment for the appellant Connecticut officials sustaining the validity of the statute. (Jur. St. 3a-41a.) The court of appeals reversed and directed the entry of judgment for these appellees. (*Id.* at 44a-63a.) The court recognized that the Connecticut statute fixed minimum prices for beer in the three adjoining states and held that this condemned the statute according to Commerce Clause precedents as venerable as *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925), and as recent as last term's *Edgar v. Mite Corp.*, 102 S. Ct. 2629 (1982).

## ARGUMENT

It is hard to discern from the jurisdictional statement why the appellant Connecticut officials believe that the court of appeals decided wrongly the question they present to this Court: whether the beer price affirmation provisions "have an impermissible extraterritorial effect in violation of the Commerce Clause . . . ." (Jur. St. i.) They do not challenge the precedents on which the court of appeals relied in giving its affirmative answer to the question or even, in any serious way, the court of appeals' reading of those precedents. The most they do is to complain of some trivial misunderstandings and to offer some quibbling distinctions at the fringes. Thus, our argument in favor of summary affirmance can be quite brief.

## POINT I

### THE COURT OF APPEALS CORRECTLY HELD THAT THE CONNECTICUT PRICE AFFIRMATION PROVISIONS IMPERMISSIBLY REGULATE COMMERCE OUTSIDE CONNECTICUT

Both the courts below recognized that the new beer price affirmation provisions, taken with the price posting statute on which they were superimposed, regulate and control beer prices offered by brewers to wholesalers in the states of New York, Massachusetts and Rhode Island.

There is no dispute as to how the legislation operates. When brewers post their prices to Connecticut wholesalers for a month on the thirteenth day of the preceding month, they must also affirm, in substance, that during the month covered by the posting they will not charge in any adjoining state a price lower than their corresponding posted price. The posted Connecticut price thus fixes the minimum price for the same brand of beer in the same container in Massachusetts, New York and Rhode Island.

As the district court said:

> [B]ecause it is geared to the future, the Connecticut statute effectively sets minimum prices for the four-state area once the price is posted in Connecticut on the thirteenth of the month. (Jur. St. 36a.)

The court of appeals agreed:

> [T]hese sections tell a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, it may not do so at a price lower than that it has previously announced it will charge to Connecticut wholesalers.
>
> * * * * * *
>
> Thus, the obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-

Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut. (Jur. St. 60a.)

Indeed, even the appellants have conceded that "[u]ndeniably, a brewer cannot lower its price in a contiguous state during the thirty day posting period in Connecticut." (Jur. St. 20.)[3] Thus, the only issue presented by this appeal is whether such regulation by Connecticut of the prices charged in other states is permissible under this Court's recent holding in *Edgar v. Mite Corp.*, 102 S. Ct. 2629 (1982), and its prior precedents construing the Commerce Clause.

**A. *Edgar v. Mite Corp.* and Prior Decisions Invalidating Efforts of States To Reach Beyond Their Borders Establish the Unconstitutionality of the Price Affirmation Provisions**

The court of appeals correctly applied well-established precedent in holding that the Connecticut law's regulation and control of persons and conduct outside Connecticut is prohibited by the Commerce Clause. *Edgar v. Mite Corp., supra; Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524, 528 (1935); *Shafer v. Farmers Grain Co., supra*, 268 U.S. at 199.

In *Edgar v. Mite Corp.*, this Court invalidated an attempt by Illinois to regulate tender offers for Illinois corporations or any corporation at least 10 percent of whose equity securities were held by Illinois shareholders. The Court held that the statute, which sought to regulate the conditions under which any such tender offer could be made, not just in Illinois but in all other states, violated the Commerce Clause. Taking note of the traditional Commerce Clause balancing test announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), Justice White, speaking at this point for the Court, stated that "[i]nsofar as

[3] Appellants overstate: What is forbidden is to reduce a price in a contiguous state below the corresponding price in Connecticut. That is how the Connecticut statute determines the minimum prices in the adjoining states.

the Illinois Act burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 102 S. Ct. at 2642.[4] As Justice White stated elsewhere in the plurality opinion, the "Commerce Clause . . . permits only *incidental* regulation of interstate commerce by the states; direct regulation is prohibited." *Id.* at 2640.

*Edgar v. Mite Corp.* is the latest in a long series of rulings by this Court that states may not regulate economic activity outside their borders. Earlier cases were cited in the *Mite Corp.* opinion and by the court of appeals. 102 S. Ct. at 2641; Jur. St. 53a-54a. As early as 1925, the Court held in *Shafer v. Farmers Grain Co., supra,* 268 U.S. at 199, that "a state statute which, by its necessary operation, directly interferes with or burdens . . . [interstate] commerce, is a prohibited regulation and invalid, regardless of the purpose with which it was enacted." Similarly, in *Baldwin v. G.A.F. Seelig, Inc., supra,* 294 U.S. 511, this Court struck down a New York milk pricing regulatory scheme similar to Connecticut's beer pricing legislation. The statute in *Baldwin* required New York milk producers to sign an agreement that if they purchased milk from farmers outside New York they would pay a price no lower than the price charged by New York farmers for similar milk. This Court held that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." 294 U.S. at 521. *See also Southern Pacific Co. v. Arizona, supra,* 325 U.S. at 775.

These cases establish that Connecticut may not regulate the price at which a brewer sells its beer in New York, Massachusetts or Rhode Island. The beer price affirmation provisions constitute such an impermissible regulation.

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[4] In at least one significant respect, the Connecticut statute is even more offensive to Commerce Clause principles than the Illinois statute invalidated in *Edgar v. Mite Corp.* The Illinois statute at least purported to protect non-Illinois shareholders, whom, the Court found, Illinois had no interest in protecting. 102 S. Ct. at 2641-42. In contrast, the Connecticut statute disadvantages non-residents by imposing minimum beer prices in the adjoining states.

**B. Connecticut's Arguments for Sustaining the Price Affirmation Provisions in the Face of This Court's Rulings Are Without Merit**

Connecticut, as we have said, does not contend that the Commerce Clause cases of this Court relied on below were incorrectly decided, and scarcely even contends that the court of appeals seriously misread the opinions in applying them to the case of the beer price affirmation provisions. Connecticut attempts only to draw some quibbling distinctions[5] between its case and some of this Court's precedents. It argues that this case differs from *Baldwin v. G.A.F. Seelig, Inc., supra,* in that, while the statute there aided in-state milk producers, the Connecticut statute does not help Connecticut breweries because there are none. (Jur. St. 15.) Connecticut also asserts that the brewers, not the state, initially set the price at which they will offer beer in Connecticut. (*Id.*) These factual differences are irrelevant. The beer price affirmation provisions involve the same extraterritorial imposition of price schedules condemned by this Court in *Baldwin.* The lack of Connecticut brewers and the fact that the minimum New York, Massachu-

[5] Appellants also claim, in what they themselves dismiss as "only an alternative or secondary" argument (Jur. St. 12), that this Court should somehow sever § 30-63a(b), which prohibits sales in Connecticut at prices higher than the lowest prices in any of the adjoining states, from the rest of the price affirmation provisions and their preexisting statutory context. (Jur. St. 11-12.) They say that this section, standing alone, does not fix beer prices in other states. But this section does not stand alone. The price affirmation provisions, including § 30-63a(b), *were* enacted together and *were* written into a statutory scheme that included price posting. The price at which a brewer may offer its products at any given time in Connecticut is posted by the brewer on the thirteenth day of the preceding month. Thus, to comply with § 30-63a(b), the brewer must maintain prices in the adjoining states which are higher than the posted Connecticut price throughout the posting period. There has been no hint from the Connecticut Legislature or—until past the eleventh hour—from the appellant state officials that one part of the scheme could be severed from the others and stand by itself. The appellants first made their severance suggestion in asking the court of appeals for a stay pending appeal to this Court. The court denied the motion, and it was not even renewed here.

setts and Rhode Island prices are only enforced and not initially established by Connecticut do not eliminate or even mitigate the extraterritorial reach of the Connecticut statute. The Connecticut statute, like that in *Baldwin*, purports to regulate the price at which goods may be bought or sold in another state.

Appellants' argument (Jur. St. 23) that the brewers remain free to decide whether to sell their products in Connecticut and thereby to subject themselves to the Connecticut pricing regulations is a familiar attempt to dodge the prohibition of the Commerce Clause. That freedom of the brewers does not at all distinguish their case from any relevant Commerce Clause precedent. The offeror in *Edgar v. Mite Corp.* similarly could have avoided the illegal regulation by not making a tender offer for an Illinois corporation, and the milk producer in *Baldwin* could have avoided the New York pricing statute by selling its products outside New York or purchasing all of its milk within the state. The precedents establish that a state may not condition the privilege of doing business in the state on a person's implied consent to the illegal regulation by that state of business transactions which take place in another state.

Appellants also mistakenly argue that the beer price affirmation provisions cause nothing more than a "complication of business judgments" (Jur. St. 16), which is not impermissible under *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). The statute in *Exxon* banned ownership of Maryland service stations by oil refiners and required refiners to extend price reductions offered to any Maryland service station to all other Maryland service stations. Thus, that legislation regulated only *in-state* business activities and prices without reference to out-of-state practices or prices.

Finally, Connecticut cites and refers at a number of points in its jurisdictional statement (pp. 12, 14-15, 16-20, 24) to *Joseph E. Seagram & Sons, Inc. v Hostetter*, 384 U.S. 35 (1966). By such repetition Connecticut would have this Court believe that its decision in *Seagram* that a different New York

liquor price affirmation statute was not unconstitutional on its face somehow bears on this case. But appellants offer no reasoned argument why this is so. In this they are prudent, because the court of appeals pointed out the difference between the New York statute sustained in *Seagram* and the Connecticut legislation:

> [T]he New York law, although it affected the prices that manufacturers would choose to set in other states, did not limit the freedom of a manufacturer at any given time to raise or lower prices in any other state. (Jur. St. 61a.)

The New York statute, in the court's view, did not set prices in other states. Accordingly, the court of appeals correctly held:

> We thus find in *Seagram* no indication that a state is permitted to control the prices at which liquor may be sold in other states . . . . (Jur. St. 62a.)

## POINT II

## CONNECTICUT'S OUT-OF-STATE REGULATION OF BEER PRICING IS NOT PROTECTED BY THE TWENTY-FIRST AMENDMENT

There can be no question that the Connecticut price affirmation provisions unconstitutionally regulate out-of-state activity. The mere fact that beer, the subject of those statutory provisions, is an alcoholic beverage does not make constitutional extraterritorial regulation that would be unconstitutional if some other commodity were involved. As the court of appeals held, where a state statute does not seek to regulate the importation or distribution of alcohol into that state but rather seeks to regulate the pricing of that commodity in other states, the Twenty-first Amendment provides no protection for the state's venture into extraterritoriality. (Jur. St. 60a.)

The court of appeals, in so holding, was no more than applying the rule this Court laid down in *California Retail*

*Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). The Court held that where a state statute is not an exercise of a state's plenary power over the importation of liquor into the state and the system of distribution within the state, but is some other kind of regulation, such as a regulation of pricing, the statute is subject to the balancing of the federal interest in unfettered interstate commerce against whatever legitimate interests the state seeks to advance by the statute. In the present case, it is undisputed, and the courts below have found, that the beer price affirmation provisions do not restrict the importation or distribution of beer into Connecticut. Instead, the Connecticut legislation regulates prices in New York, Massachusetts and Rhode Island. As the court of appeals correctly held:

> Nothing in the Twenty-first Amendment permits Connecticut to set the minimum prices for the sale of beer in any other state, and well-established Commerce Clause principles prohibit the state from controlling the prices set for sales occurring wholly outside its territory. (Jur. St. 60a.)

There is, as in *Edgar v. Mite Corp., supra*, no legitimate interest in extraterritoriality to be balanced against the federal constitutional interest.

## CONCLUSION

The question presented by the appellants is not substantial. Connecticut's beer price affirmation provisions operate extra-territorially. Appellants do not deny the fact and scarcely more do they deny the inevitable consequence: invalidation of their state's scheme under the Commerce Clause. The judgment of the court of appeals should be affirmed summarily.

*Respectfully submitted,*

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June 29, 1983

## APPENDIX

### Listing Required by Rule 28.1 of Appellees and Their Parent Companies, Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates

Appellee United States Brewers Association, Inc., is comprised of the following member corporations: Anheuser-Busch, Inc.; Christian Schmidt Brewing Company; G. Heileman Brewing Company, Inc.; Latrobe Brewing Company; Pabst Brewing Company; The F. & M. Schaefer Brewing Company; and Jos. Schlitz Brewing Company.

Individual appellees include the following corporations: Anheuser-Busch, Inc.; Champale, Inc.; Miller Brewing Company; Century Importers; Dribeck Importers, Inc.; Guinness-Harp Corporation; Kronenbourg USA, Inc.; Martlett Importing Company; and Van Munching and Company, Inc.

The parent companies, subsidiaries (other than wholly-owned) and affiliates of each member of the United States Brewers Association, Inc., and of each individual corporate appellee are listed below under the name of the related association member or individual appellee:[6]

*Anheuser-Busch, Inc.*

Parent—Anheuser-Busch Companies, Inc.

Subsidiaries and Affiliates—St. Louis National Baseball Club, Inc.; Busch Properties, Inc.; Consolidated Farms, Inc.; Metal Container Corporation; Kingsmill Realty, Inc.; St. Louis Refrigerator Car Company; Manufacturer's Railway Co.; Manufacturer's Cartage Co.; M.R.S. Redevelopment Corporation; M.R.S. Transport Company; Williamsburg Transport, Inc.; Fairfield Transport, Inc.; Busch Entertainment Corp.; Kingsmill Resorts, Inc.; Container Recovery Corporation; Metal Label Corporation; International Label Company; Busch Creative Services Corporation; Sesame Place, Inc.; Anheuser-Busch International Finance N.V.; Carolina Peanuts of Robersonville, Inc.; Golden Eagle Distributing Co.; Busch Agricultural Resources, Inc.; Busch Industrial Products Corporation; Anheuser-Busch International, Inc.; Anheuser-Busch Europe, Inc.; AB Subsidiary, Inc.

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[6] Based on information provided by the companies.

*Christian Schmidt Brewing Company*

none

*G. Heileman Brewing Company, Inc.*

none

*Latrobe Brewing Company*

none

*Pabst Brewing Company*

none

*The F. & M. Schaefer Brewing Company*

Parent—The Stroh Brewery Company

*Jos. Schlitz Brewing Company*

Parent—The Stroh Brewery Company

Affiliates—La Cruz Del Campo S.A., Henninger Espanola S.A.

*Champale, Inc.*

Parent—Iroquois Brands, Ltd.

*Miller Brewing Company*

Parent—Philip Morris, Inc.

*Century Importers, Inc.*

Parent—Carling O'Keefe, Ltd. of Toronto

*Dribeck Importers, Inc.*

none

*Guiness-Harp Corporation*

Parent—Guiness Overseas, Ltd., London, England

*Kronenbourg USA, Inc.*

Parent—B.S.N., Paris, France

*Martlett Importing Co., Inc.*

Parent—Molson Breweries of Canada, Ltd., Montreal, Quebec

*Van Munching & Co., Inc.*

none